

Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy

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I. INTRODUCTION: DISCRIMINATION, EXPECTATIONS, AND EXCEPTIONS

America's employment discharge policy begs for reform. Although most states have created exceptions to the employment at will doctrine,¹ the doctrine thrives. Title VII of the Civil Rights Act of 1964 ("Title VII"),² which bans

¹ The employment at will doctrine is a doctrine at common law that permits the employer to discharge an employee for any reason or for no reason at all. *See* Richard A. Epstein, *In Defense of the Contract at Will*, in *LABOR LAW AND THE EMPLOYMENT MARKET* 3, 3-5 (Richard A. Epstein & Jeffrey Paul eds., 1985); *see also infra* notes 278-340 and accompanying text; *see generally* RICHARD A. POSNER, *OVERCOMING LAW* 299-311 (1995).

² 42 U.S.C. §§ 2000e to 2000e-17 (1994). The original federal employment discrimination law was passed as Title VII of the Civil Rights Act of 1964. As amended, Title VII states in relevant part:

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (1994).

Since the passage of Title VII, Congress has passed laws banning age discrimination in employment, *see* Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1994), and discrimination based on disabilities, *see* Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12102, 12111-12117, 12201-12213 (1994) (corresponds to the Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, §§ 101-108, 104 Stat. 327, *amended by* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071). Because the ADA requires different proof, my proposal does not cover the ADA.

The ADEA, in its relevant part, makes it unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

discrimination in employment based on race, gender, color, religion, and national origin, has proved ineffective in combating employment discrimination.³ Despite the statutory and common law exceptions⁴ to the employment at will doctrine, today's employees may have less job security than in the past. In a bygone era, large corporate employers rewarded employee

29 U.S.C. § 623(a).

³ See discussion *infra* Part II.

Title VII permits two types of suits: disparate treatment and disparate impact suits. Although the law permits a group or class of plaintiffs to use disparate treatment cases to allege patterns and practices of discrimination against protected groups, *see generally* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), disparate treatment suits are normally brought by individuals for discriminatory treatment in the workplace. *See, e.g.,* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that in individual disparate treatment cases an employer is liable for decisions made that are based on sexual stereotyping). Disparate impact cases attack a facially neutral policy that has a disparate effect on a protected group. *See, e.g.,* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding that requiring a high school diploma or the passing of a standardized general intelligence test as a condition of employment violated Title VII because neither requirement bore a demonstrable relationship to successful performance of the jobs while both had a disproportionate effect upon blacks applying for the jobs). In disparate impact cases, plaintiffs do not have to prove that the defendant engaged in intentional discrimination. Rather, they merely have to show that the policy has a disproportionate impact on a protected class. The burden then shifts to the employer to prove that the policy or practice is a business necessity. *Id.* at 428-32.

Most employment discrimination cases brought, however, are individual discriminatory treatment cases. *See infra* notes 61-86 and accompanying text. In these cases, plaintiffs must prove that the defendant intended to discriminate. *See infra* notes 61-86 and accompanying text. This Article and my proposal deal with individual discriminatory treatment cases and the difficulties that arise because the plaintiff must prove that the defendant *intended* to discriminate.

⁴ The federal and state civil rights in employment acts are partially responsible for common law exceptions to the employment at will doctrine. Civil rights plaintiffs expanded the wrongful discharge law by including counts under state law in their complaints. One very important reason for doing so, was to acquire a jury trial in a Title VII case where there would otherwise be no right to a jury. Until the passage of the Civil Rights Act of 1991, there was no right to a jury in a Title VII suit. *See* Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 205 n.9, 210 n.26 (1993). Even if the jury would not decide the Title VII issue, to the extent it would decide common fact questions, its determination would be binding on the court hearing the Title VII claims. *See, e.g.,* Roebuck v. Drexel Univ., 852 F.2d 715, 737 (1988) (holding that jury finding on a claim brought under 42 U.S.C. § 1981 was binding on judge in Title VII claim). Ironically, these statutory and common law exceptions to employment at will have raised unrealistic expectations of job security for the average worker.

loyalty with job security.⁵ Increasingly, today's employers ignore years of loyal service;⁶ the bottom line governs decisions concerning employee retentions or dismissals. Even now that the major companies have weathered the recessions of 1982 and 1989 and transition to a post-industrial economy, layoffs and downsizing continue.⁷

Employment law scholars for the past twenty years have called for greater job security for workers, arguing that either the courts⁸ or the legislature⁹ should overrule the employment at will doctrine. Recently, the National Conference of Commissioners on Uniform State Laws has proposed a Model Employment Termination Act ("META"),¹⁰ that would require an employer to have "good cause" before firing an employee.¹¹

Although I applaud the Commissioners' efforts toward achieving justice in

⁵ IBM, Kodak, and Xerox, for example, have long harbored reputations for taking care of their employees. See Paul B. Carroll, *IBM Wants Its Managers to Encourage Certain Workers to Leave the Company*, WALL ST. J., May 23, 1991, at A4; Laurie Hays, *Blue Period: Gerstner Is Struggling as He Tries to Change Ingrained IBM Culture*, WALL ST. J., May 13, 1994, at A1; *IBM Ending "No Layoff" Policy*, BUFFALO NEWS, Feb. 16, 1993, at B7; *IBM Says It Will Resort to Layoffs*, DALLAS MORNING NEWS, Feb. 25, 1993, at 2D; John McLaughlin, *NYNEX Takes Dismal Road of Downsizing to "Up Profits,"* NEWARK STAR-LEDGER, Dec. 19, 1993, § 3, at 3; Matt Murray, *Thanks, Goodbye: Amid Record Profits, Companies Continue to Lay Off Employees*, WALL ST. J., May 4, 1995, at A1; John R. Wilke, *Management: Firms Oust "No Layoff" Tradition*, WALL ST. J., Apr. 13, 1990, at B1.

⁶ Hays, *supra* note 5; Laurence Hooper, *"L" Word Is Official at IBM; Cutbacks to Include First Layoffs in 50 Years*, WALL ST. J., Feb. 25, 1993, at B8; Murray, *supra* note 5; Wilke, *supra* note 5.

⁷ See Murray, *supra* note 5 (demonstrating that large companies such as Procter & Gamble, American Home Products, Sara Lee, Banc One, Xerox, AT&T, and Westinghouse Electric continue to lay off employees even while their profits are increasing); Stuart Silverstein, *More Big Firms Cut Jobs Despite Economy's Rise*, L.A. TIMES, Sept. 27, 1994, at D2.

⁸ See Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967) (arguing for the development of a tort remedy to protect employees against their employers' use of abusive power against them); Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 4, 21-26 (1979) (arguing that because of the heavy regulation of employers by federal and state law, a private employer's discharge of an employee is state action which violates the Equal Protection Clause and procedural due process).

⁹ See Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976) (arguing that state statutes should protect employees against unjust dismissal).

¹⁰ MODEL UNIFORM EMPLOYMENT TERMINATION ACT (1991), reprinted in 9A Lab. Rel. Rep. (BNA) 540:21 (Aug. 8, 1991).

¹¹ See *id.* § 3.

the workplace, I believe that abolishing the employment at will doctrine through state legislative enactment is a conceptually flawed approach. Partially due to the decline of unionism in this country,¹² workers have little concerted power. In order to pass important, protective legislation, workers need the support of civil rights advocates. By its nature, state wrongful discharge legislation must exclude federal employment discrimination claims from its coverage, thus failing to marshal the political power of civil rights advocates in support of strong protective measures for all workers. The result is inevitable. Because individual employees have no power base, their representatives must compromise heavily with employers, resulting in a Model Act that is unacceptable to employees.¹³

Moreover, this exclusion of federal (and state) antidiscrimination law from the coverage of wrongful discharge law ignores the causal link between antidiscrimination legislation and common law exceptions to the employment at will doctrine. The exclusion of antidiscrimination law also assumes incorrectly that the antidiscrimination statutes effectively protect individuals from discriminatory discharge. Given the failure of antidiscrimination law to protect against unlawful discharge, Congress should create a consistent national employment discharge policy. This policy would replace the current patchwork of civil rights laws regulating workplace discharge. It would protect all workers from unjust dismissals,¹⁴ including workers currently protected by federal antidiscrimination law. *This law should abolish Title VII insofar as it protects individuals from discriminatory discharges other than harassment and retaliation. It should abolish the ADEA protection for individual employees. In their place, the new Act should create protections from arbitrary discharges for all workers, including those who currently are members of one or more protected classes under Title VII and the ADEA.*

Part II of this Article describes the history of antidiscrimination in employment laws and recent trends in interpreting them. It posits that the

¹² See Leonard Silk, *Worrying Over Weakened Unions*, N.Y. TIMES, Dec. 13, 1991, at D2.

¹³ Professor Cornelius Peck acknowledges this compromise, but comes to a different conclusion. Where I call for national legislation, Professor Peck believes that because individual employees lack power, courts should adopt new common law that is protective of employees. See Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 WASH. L. REV. 719, 752 (1991).

¹⁴ I focus on discharges because there has been a marked shift in Title VII suits from discriminatory hiring to discriminatory firing suits. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015 (1991). In 1966, 50% more hiring discrimination charges were made than discharge cases. By 1985 this trend had reversed. That year, 19% of all charges filed with the EEOC alleged discrimination in hiring, while 50% alleged discriminatory discharge. See *id.*

protection antidiscrimination laws grant to individual employees is largely illusory. Furthermore, it suggests causes for the decline in the laws' enforcement and effectiveness. Part III analyzes the evolution of common law and statutory exceptions to the employment at will doctrine and the Model Employment Termination Act. In Part IV, I propose a federal wrongful discharge statute that would provide a unitary solution to the problem of unlawful discharge of all employees.

II. THE SURGE AND DECLINE OF CIVIL RIGHTS IN EMPLOYMENT

Title VII has utterly failed to achieve its corrective purpose of redressing the individual rights of victims of discrimination in employment. By "utter failure" I do not imply that Title VII has never compensated any victims of discrimination. My complaint is that it does not protect the rights of the vast majority of victims of modest income who suffer from hidden discrimination.¹⁵ The public and the legislature appear blithely unaware of this failure.¹⁶

The historical background of the Civil Rights Act of 1991 ("1991 Act")¹⁷ may explain the general belief that Title VII provides an adequate remedy to discrimination victims. Congress enacted the 1991 Act in the wake of the confirmation hearings of Justice Clarence Thomas to the United States Supreme Court. Analysts believe that the 1991 Act would not have become law but for the angry public sentiment against sexual harassment engendered by the hearings.¹⁸ Those who witnessed the confirmation hearings and the debate over the 1991 Act heralded the Act for providing a remedy for the loss of personal dignity suffered by an employee who is sexually or racially harassed.¹⁹ The

¹⁵ See *infra* discussion Part II.

¹⁶ See, e.g., Seth Faison, Jr., *Rash of Suits Seen After Rights Act*, N.Y. TIMES, Nov. 30, 1991, at A1.

¹⁷ Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C (1994)).

¹⁸ See, e.g., Cheryl R. Saban, *Sexual Harassment: Does It Exist in Your Workplace?*, 69 TRADE & IND. 282 (1993).

¹⁹ Since the 1991 Senate Judiciary Committee Hearings, when Anita Hill accused then Supreme Court Justice nominee Clarence Thomas of sexual harassment in the workplace, the charges of sexual harassment filed with the Equal Employment Opportunity Commission have more than doubled from 6883 in 1991 to 14,420 in 1994. See Leslie Alderman, *Surviving an Office Romance Without Jeopardizing Your Job*, MONEY, Feb. 1, 1995, at 37, 37; Jill L. Sherer, *Sexually Harassed*, HOSP. & HEALTH NETWORKS, Jan. 20, 1995, at 54, 54. Commentators have attributed this rise to a combination of the Hill-Thomas hearings and the changes in Title VII in the 1991 Act. See *EEOC Getting 80 to 100 Complaints Weekly Under New Disabilities Law*, Official Says, 1992 Daily Lab. Rep. (BNA) No. 202, at A-8 (Oct. 19, 1992); *Study Finds Sexual Harassment Awards from EEOC Doubled from 1992 to 1993*, 1994

public focus of the 1991 Act on damages for sexual harassment furthered the evolution of Title VII's protection from property to personal dignity rights. The movement toward protection of personal dignity reflects the notion that discrimination does not exist unless it is palpable. Harassment is palpable. Subtle discrimination leading to an employee's job loss is not.

There is another phenomenon hindering the enforcement of Title VII: the employment at will doctrine. The employment discrimination laws were initially enacted to ensure that employers did not consider race or gender in determining which individuals to hire, to maintain, to promote, or to fire; they were never designed to ban an employer's arbitrary decisionmaking if his decision was unrelated to race or gender. The employment at will doctrine, which is the bedrock from which the antidiscrimination exception is carved, narrowly circumscribes the property right created by the employment discrimination statutes. Absent proof of intentional discrimination against the

Daily Lab. Rep. (BNA) No. 100, at D-9 (May 26, 1994) [hereinafter *Study Finds Harassment Awards*]. It seems that there is more public acceptance for suits alleging sexual harassment. In 1993, 1546 Americans won a total of \$25 million from their employers in sexual harassment suits. See Lynn Ludlow, *The Jury that Roared*, S.F. EXAMINER, Sept. 4, 1994, at A16 (citing statistics from the Center for Women in Government, Albany, N.Y.); *Study Finds Sexual Harassment Awards*, *supra* at D-9. The vast publicity surrounding the Rena Weeks trial, see discussion *infra* note 229, reconfirmed the public's notion that the law is extremely protective of plaintiffs alleging sex discrimination. See, e.g., Jane Gross, *Jury Awards \$7.1 Million in Sex Case*, N.Y. TIMES, Sept. 2, 1994, at A16; *Legal Secretary Was Harassed, Jury Decides*, STAR-TRIBUNE (Minneapolis), Aug. 27, 1994, at 4D; Dennis J. Opatrny, *Jury Sends Bosses \$7 Million Message: Ex-Secretary Wins Harassment Award*, S.F. EXAMINER, Sept. 2, 1994 at A1.

I do not mean to imply, however, that the law has appropriately responded to sexual harassment in all (or even most) of the situations where it is present. Nor do I imply that the country supported Anita Hill at the time of the hearings or immediately thereafter. See Susan Estrich, *Gender, Race and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings: What Went Wrong*, 65 S. CAL. L. REV. 1393 (1992). But sometime after the hearings, there seemed to be a groundswell that led to the enactment of the 1991 Act and the election of many women representatives in Congress. See Jeanne Cummings, *Hill-Thomas Case Credited for Focusing Attention on Harassment but Women Learn There Are Hazards in Filing Complaint*, ATLANTA J. & CONST., Jan. 22, 1992, at C1; *Ferraro Hails Women's Vote*, TIMES UNION (Albany, N.Y.), Oct. 19, 1996, at B7; J. Stephen Poor, *Rights Act's Retroactivity Still Disputed*, NAT'L L. J., Jan. 27, 1992, at 19, 19.

Moreover, the Thomas hearings raised the spectre of the problem of black women facing sexual harassment. Sexual harassment of black women is not merely a combination of the injuries of sexual harassment and racism, but a separate wrong itself derived from a very different history. See Kimberle Crenshaw, *Gender, Race and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings: Race, Gender and Sexual Harassment*, 65 S. CAL. L. REV. 1467 (1992).

individual in a discriminatory treatment case, there is no individual right to an equal opportunity to a job or to keep one's job.

Besides the shift from property to dignity rights and the employment at will doctrine there are a host of serious obstacles facing potential employment discrimination plaintiffs. The Equal Employment Opportunity Commission ("EEOC") is flooded with charges of discrimination that it cannot adequately investigate.²⁰ Because of the need for extensive discovery, employment discrimination suits are extremely expensive.²¹ In the past ten years, courts have aggressively used summary judgment to dismiss meritorious claims.²² Courts have required many employment discrimination plaintiffs to bring their claims before commercial arbitrators who have little or no expertise in civil rights law,²³ and the Supreme Court has made it virtually impossible to prove employment discrimination cases with circumstantial evidence.²⁴ The remainder of this Part examines these problems.

A. From Property to Dignity: An Evolution of Rights

When a plaintiff sues alleging employment discrimination, she sues to redress two injuries: her deprivation of employment opportunities as well as the personal injury she suffers resulting from the employer's use of her race, sex, religion, age, or national origin in his decision to discharge her. These injuries are based on violations of two very different rights. The first is a property right to employment created by the employment discrimination laws. The second is a right to personal dignity.²⁵

For years after the Civil Rights Act of 1964 ("1964 Act") was enacted, the law recognized only a violation of a plaintiff's property right. The measure of damages for a violation of the employment discrimination laws was the amount of compensation the plaintiff lost, or back pay.²⁶ The 1964 Act did not permit the court to award compensatory or punitive damages.²⁷

With the recognition of sexual and racial harassment as causes of action

²⁰ See discussion *infra* Part II.B.

²¹ See COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS: REPORT AND RECOMMENDATIONS 25-26 (Dec. 1994).

²² See McGinley, *supra* note 4.

²³ See discussion *infra* Part II.C.3.

²⁴ See discussion *infra* Part II.C.2.

²⁵ In *Weeks v. Baker & McKenzie*, 66 FEP Cases (BNA) 581 (Cal. Super. Ct. 1994), the court stated, "[s]exual harassment strips the victim of dignity and self-respect. Such harassment is degrading and dehumanizing." *Id.* at 582.

²⁶ See McGinley, *supra* note 4, at 205 n.9, 210 n.26.

²⁷ See 42 U.S.C. 2000e-5(g) (1988); *United States v. Burke*, 504 U.S. 229, 238 (1992).

under Title VII, the traditional remedies available to Title VII plaintiffs were insufficient to compensate the plaintiffs for the injuries caused to their personal dignity as a result of the harassment. For example, a plaintiff could suffer from a hostile work environment, but if she was psychologically tough enough to stay in the job, there was no compensation for the loss of dignity she suffered as a result of a violation of Title VII.²⁸ When Congress enacted the 1991 Act, it debated the question of compensation of harassment victims,²⁹ a debate resulting in the addition of compensatory and punitive damage awards under Title VII.³⁰

The harassment cases are high profile and compelling; Congress rightfully recognized the personal dignity loss. But nowhere in the long debates over the 1991 Act did Congress address, or even seem to be aware of, the practical difficulties of a typical plaintiff who can point to no instance of overt harassment or discrimination. Although the loss to personal dignity is clear where a plaintiff suffers from overt harassment, in cases where harassment is not involved, there is often ambiguous or no evidence whatsoever of overt discrimination. Although these plaintiffs may not have a cognizable claim for a loss of personal dignity, many of them have suffered a loss of employment or property rights. It has become extremely difficult to prove that discrimination caused this loss.

One of the reasons for the difficulty is the increased employer awareness of discrimination law and the lack of "smoking guns" as a result.³¹ Employers who intentionally discriminate against employees can often hide their intent.

Another problem is the intent requirement itself. Even though an employer may make discriminatory decisions, the plaintiff has no remedy unless she can prove that the defendant has intended to discriminate.³² Because racism and sexism are such deep-seated phenomena, many people unknowingly make decisions based on them.³³ But courts will not find that decisions are race-based or gender-based without proof of a clear intent to discriminate. This

²⁸ If the situation was so terrible that she had to leave the job, courts would recognize a claim of constructive discharge which would permit the plaintiff to collect back pay. *See generally* Landgraf v. USI Film Prods., 511 U.S. 244 (1994); Winsor v. Hinckley Dodge, Inc., 79 F.3d 996, 1002 (10th Cir. 1996).

²⁹ *See, e.g.*, H.R. REP. NO. 102-40(I), at 64-74 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 602-12. In fact, some circuits held there was no violation absent psychological injury to the plaintiff. *See* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986). This view was overturned in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

³⁰ *See* Civil Rights Act of 1991, P.L. 102-166, § 102(b), 105 Stat. 1071, 1073 (1991) (codified as 42 U.S.C. § 1981a(b) (1994)).

³¹ *See* McGinley, *supra* note 4, at 215 n.45.

³² *See* discussion *infra* Part II.C.2.c.

³³ *See infra* notes 135-48 and accompanying text.

unwillingness may be partially responsible for causing the shift of Title VII enforcement, from a statute that successfully vindicates a person's property right to one that vindicates a plaintiff's right to personal dignity; a discriminatory discharge is not always obvious, but an affront to personal dignity is usually overt.

To the extent the law fails to separate the two concepts of property and personal dignity rights in the employment area, the law imposes the burden to prove the impossible on individuals who suffer a property loss that is not accompanied by overt discrimination. To ensure that working persons receive the protections the law attempts to insure, the law should deal separately with a plaintiff's loss of property and dignity.³⁴

B. EEOC: Administrative Overload

The EEOC was created by the 1964 Act.³⁵ The 1964 Act authorizes the EEOC to prevent persons from engaging in discriminatory employment practices.³⁶ It requires that a person alleging discrimination in employment give the EEOC an opportunity to investigate the claim by filing a charge with the EEOC and waiting for a "right to sue letter," before filing suit.³⁷ When passing

³⁴ In *United States v. Burke*, 504 U.S. 229, 229 (1992) and *Commissioner v. Schleier*, 115 S. Ct. 2159, 2163 (1995), the Court refused to permit race and age discrimination plaintiffs to exclude back pay and liquidated damages remedies from gross income. In *Schleier*, the Court concluded that an action under the ADEA is not "on account of personal injury or sickness." 115 S. Ct. at 2164-65. This view seems to see discrimination claims, at least those brought before the 1991 Act, as a means of redressing property rather than personal rights.

³⁵ Pub. L. No. 88-352, § 705, 78 Stat. 241, 258 (codified as amended at 42 U.S.C. § 2000e-4 (1994)).

³⁶ See 42 U.S.C. § 2000e-5(a) (1994).

³⁷ The Commissioner serves notice of the charge on the employer and investigates the charge. If the EEOC finds reasonable cause to believe that the charge is accurate, it must try to eliminate the illegal practice by informal methods such as conference, conciliation, and persuasion. See 42 U.S.C. § 2000e-5(b). If these methods are unsuccessful, the EEOC may, but is not required to, bring a civil lawsuit against the respondent. See 42 U.S.C. § 2000e-5(f)(1). If the EEOC decides not to bring a suit, it will issue a right to sue letter. See *id.*

If, in contrast, the EEOC finds that there is no probable cause for the charge, it will dismiss the action and notify the claimant and the respondent. See *id.* After receiving the dismissal notice, the aggrieved party may file a private civil action against the respondent. See *id.*

If 180 days have passed and the EEOC has not made a determination whether reasonable cause exists, the aggrieved party may go directly to court to file a civil action. See *id.* This occurs in the vast majority of cases.

Title VII, Congress did not anticipate the number of charges that would be filed with the EEOC. As the number of claims with the EEOC has grown, the agency has become increasingly mired in its own work, unable to decide individual claims before issuing the right to sue letter.³⁸ As of May 1995, the EEOC had a backlog of over 100,000 cases, an increase from an average backlog of 30,000 to 40,000 during the 1980s.³⁹ The EEOC has not been able to keep up with the increase. From 1989 until 1994 resolution of discrimination charges has increased by only 9.6%.⁴⁰ The ever-growing backlog, along with new enforcement responsibilities resulting from the ADA⁴¹ and the effect of fiscal restraint "have had a devastating impact on the country's chief civil rights enforcement agency."⁴²

Charging parties, respondents, civil rights advocates, and employment discrimination attorneys lack confidence in the EEOC's ability to handle the caseload.⁴³ Although the EEOC has recently announced changes in its processing of charges,⁴⁴ it is doubtful that, absent a complete overhaul of its powers and responsibilities, the EEOC will be able to accommodate the caseload.⁴⁵

Because the EEOC and various state and local agencies enforcing the federal civil rights acts and state and local human rights laws are so overburdened, they have become ineffectual in resolving disputes between

³⁸ See *Sims v. MacMillan*, 22 F.3d 1059, 1062 (1994); *Rolark v. University of Chicago Hosp.*, 688 F. Supp. 401, 404 (1988).

³⁹ See *EEOC Adopts Charge-Priority System*, 1 Lab. Rel. Rep. (BNA) (149 Analysis: News and Background Info.) 13, 14 (May 1, 1995). The EEOC caseload has increased from 64,000 charges brought in 1991 to 95,000 brought in 1995, a 49% increase. See *id.* In 1995, the first drop in charges brought before the EEOC occurred. See *EEOC: Drop in Charges, Inventory Attributed to Improved Procedures Adopted by EEOC*, 1996 Daily Lab. Rep. (BNA) No. 19, at A-1 (Jan. 30, 1996) (finding a 4% decrease in charges filed during fiscal year).

⁴⁰ See Peter Eisler, *Complaints Now Sit for at Least a Year*, USA TODAY, Aug. 15, 1995, at 1A.

⁴¹ See *EEOC Getting 80 to 100 Complaints Weekly Under New Disabilities Law, Official Says*, *supra* note 19, at A-8.

⁴² *EEOC Adopts Charge-Priority System*, *supra* note 39, at 13. As of 1994, the average time it took the EEOC to process a charge was 328 days. See *Statement of EEOC Chairman Casellas Before Senate Labor and Human Resources Committee, May 23, 1995*, 1995 Daily Lab. Rep. (BNA) No. 100, at D-23 (May 24, 1995).

⁴³ *EEOC Adopts Charge-Priority System*, *supra* note 39, at 14.

⁴⁴ See *id.* at 13.

⁴⁵ Besides the EEOC's role in individual cases, it is authorized to bring test cases under 42 U.S.C. § 2000e-5(f)(1) (1994) and to write interpretive guidelines, rules, and regulations for the law under 42 U.S.C. § 2000e-12 (1994). Although these latter functions are important, the EEOC's primary function is to act as a gatekeeper in individual suits.

employers and employees. The vast majority of claims brought before the EEOC are not resolved by the agency,⁴⁶ and the vast majority of potential plaintiffs cannot afford to bring suit in federal court.⁴⁷

The financial barriers are insurmountable for all but the wealthiest of litigants.⁴⁸ Because they require a showing that the employer intended to discriminate for some illegal reason, employment discrimination suits foster extremely costly discovery.⁴⁹ The financial and emotional toll these suits take on plaintiffs discourages many victims of discrimination from bringing suit.⁵⁰ Even the right to attorney's fees under the 1964 Act,⁵¹ a right that is essential, does not compensate the plaintiff adequately. The costs alone can be exorbitant. Many cases take three or four years, or more, to come to trial. This statute, which is supposed to vindicate the rights of persons who are, by definition, either unemployed or underemployed, permits only those who are independently wealthy, or who have lost positions with very high salaries to bring individual suits.⁵²

The result: an elite group of employment discrimination plaintiffs recover monetary awards, fueling an elite group of employment discrimination

⁴⁶ See *supra* text accompanying notes 38–40.

⁴⁷ See COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS: FACT FINDING REPORT 113 (May 1994) [hereinafter DUNLOP COMMISSION FACT FINDING REPORT].

⁴⁸ See COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS: REPORT AND RECOMMENDATIONS 25–26 (Dec. 1994) [hereinafter DUNLOP COMMISSION REPORT AND RECOMMENDATIONS]. The Commission estimates that for every dollar transferred in litigation to a deserving claimant, another dollar is spent on attorneys fees and the costs of handling claims. See *id.* at 25. Furthermore, employers spend in excess of these direct costs to avoid litigation. See *id.*; see also DUNLOP COMMISSION FACT FINDING REPORT, *supra* note 47, at 111–13.

⁴⁹ See Tom Wicker, *Civil Rights Nominee Wrong Man for Job*, ST. LOUIS POST-DISPATCH, July 7, 1989, at 3B.

⁵⁰ See *supra* note 48 and accompanying text.

⁵¹ 42 U.S.C. § 2000e-5(k) (1994).

⁵² See DUNLOP COMMISSION REPORT AND RECOMMENDATIONS, *supra* note 48, at 25–26; DUNLOP COMMISSION FACT FINDING REPORT, *supra* note 47, at 113. Donohue and Siegelman explain that the propensity of a discharged worker to sue will rise with the wages in the job from which he or she has been rejected. This is because the cost of litigation remains fairly constant while the rewards for a successful suit rise with the amount of wages lost. Donahue & Siegelman, *supra* note 14, at 1006–11. This result was particularly true when, before the passage of the 1991 Act, back pay was the primary monetary reward for winning a discrimination suit. Since the passage of the 1991 Act, which amended the law to permit the plaintiff to collect compensatory and punitive damages, the nature of the discrimination may play a greater role in determining whether an employee decides to sue. If there is an obvious affront to the personal dignity right, the opportunity to collect punitive damages will likely be greater.

lawyers.⁵³ Although many of these lawyers do an excellent job, workers with average salaries cannot afford to hire them and pay the costs required to bring discharge suits.

C. Judicial Hostility Toward Civil Rights in Employment

Two cases decided by the Supreme Court within the past five years illustrate the problems facing employment discrimination plaintiffs. The first is *St. Mary's Honor Center v. Hicks*⁵⁴ which virtually destroyed the *McDonnell Douglas*⁵⁵ allocation of the burdens of proof and production where there was circumstantial, but not direct, evidence of discriminatory intent. The second is *Gilmer v. Interstate/Johnson Lane Corp.*,⁵⁶ holding that defendants in ADEA cases can force plaintiffs who have signed arbitration agreements to arbitrate their discrimination claims. These two cases, along with the lower courts' predisposition toward summary judgment in close cases, may sound the death knell of federal discrimination discharge law, in spite of the 1991 Act.⁵⁷

Both *St. Mary's* and *Gilmer* represent a disingenuous approach to civil rights law. In *St. Mary's*, the opinion distorts twenty years of Supreme Court and lower court precedent.⁵⁸ In *Gilmer*, under the guise of freedom of contract, the Court virtually exempts a whole industry—the stock exchange—from the civil rights laws.⁵⁹ Even worse, *Gilmer* lends its approval to forced arbitration of statutory rights based on an employee's uninformed signing of a predispute arbitration clause.⁶⁰ As a background to the discussion of *St. Mary's* and *Gilmer*, the next section will explain the history of the *McDonnell Douglas* standard.

⁵³ See, e.g., Thom Weidlich, *Workplace Warriors: Wife/Husband Team Are Union-Like Negotiators for Non-Union Workers*, NAT'L L.J., Feb. 5, 1996, at A1, A21 (describing employment law practice which reaps partners the same benefits as partners in corporate law firms).

⁵⁴ 509 U.S. 502 (1993).

⁵⁵ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (establishing a three-stage method of allocating burdens of persuasion and production in Title VII cases). See also discussion *infra* Part II.C.1.

⁵⁶ 500 U.S. 20 (1991).

⁵⁷ Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C. (1994)).

⁵⁸ See discussion *infra* Part II.C.2.

⁵⁹ See discussion *infra* Part II.C.3.

⁶⁰ See discussion *infra* Part II.C.3.

1. *Background History of the McDonnell Douglas Standard*

The element of intent to discriminate has become increasingly difficult to prove because normally there is no access to direct evidence of the employer's discriminatory motives.⁶¹ As a result, plaintiffs have turned to circumstantial evidence to prove discriminatory intent. In *McDonnell Douglas Corp. v. Green*,⁶² *Furnco Construction Corp. v. Waters*,⁶³ and *Texas Department of Community Affairs v. Burdine*,⁶⁴ the Court constructed the three-stage method of allocating burdens of persuasion and production known as the *McDonnell Douglas* approach. The purpose of the evidentiary approach was to assure that plaintiffs who have legitimate claims could prove their cases through circumstantial evidence.⁶⁵ Under *McDonnell Douglas*, a plaintiff alleging that she was fired due to illegal discrimination proved a prima facie case by showing: (1) that she was a member of a protected class under the 1964 Act, (2) that she was discharged, (3) that she was qualified for the job, and (4) that the employer retained persons who were not members of the protected class.⁶⁶ The purpose of requiring this initial showing was to eliminate the most common nondiscriminatory reasons for the challenged employment action: the plaintiff's lack of qualifications or the employer's lack of an available position.⁶⁷

Under the *McDonnell Douglas* construct, proof of a prima facie case creates a rebuttable presumption of discrimination, shifting the burden of production to the defendant to *articulate* a legitimate, nondiscriminatory reason for the employment decision.⁶⁸ Once the defendant makes this articulation, the burden of production shifts back to the plaintiff to demonstrate that the articulated reason is pretextual.⁶⁹ Under *Burdine*, the plaintiff would prevail in one of two ways. She could prove either that the defendant's articulated reason was not true or that even if true, it was not the real reason for the employment decision.⁷⁰

For example, if the defendant met its burden of articulating a legitimate nondiscriminatory reason for the plaintiff's discharge by stating that the plaintiff

⁶¹ This is true because of employers' increased sophistication regarding the employment discrimination laws. See, McGinley, *supra* note 4 and text accompanying note 31.

⁶² 411 U.S. 792 (1973).

⁶³ 438 U.S. 567 (1978).

⁶⁴ 450 U.S. 248 (1981).

⁶⁵ See McGinley, *supra* note 4.

⁶⁶ See *McDonnell Douglas*, 411 U.S. at 802. For a thorough discussion of the *McDonnell Douglas* formula, see McGinley, *supra* note 4, at Part I.B.

⁶⁷ See McGinley, *supra* note 4, at Part I.B.

⁶⁸ See *id.* at 218.

⁶⁹ See *id.* at 218-19.

⁷⁰ See *id.* at 219.

was consistently late for work, the plaintiff could rebut the defendant's reason by showing either that she was not consistently late for work or that other employees who were not members of the protected group were also consistently late for work and had not been fired. Either of these showings would result in a victory for the plaintiff.

There were two reasons for the *McDonnell Douglas* formulation. First, as I have already mentioned, because direct evidence of discriminatory intent was increasingly difficult to obtain as employers became aware of the law, the formula allowed the plaintiff to prove discrimination by circumstantial rather than direct evidence.⁷¹ Second, because the plaintiff retained the burden of proof throughout the proceeding, the plaintiff needed a full and fair opportunity to rebut the specific reason the defendant gave for the employee's dismissal.⁷² Without this level of specificity, the plaintiff would be left to disprove reasons for the discharge that the defendant had not even raised.

2. *St. Mary's Sin: Dismantling McDonnell Douglas*

St. Mary's Honor Center v. Hicks,⁷³ decided by the Supreme Court in June 1993, changed the *McDonnell Douglas* formula. In *St. Mary's*, the plaintiff, Melvin Hicks, a correction officer at the defendant halfway house, alleged that the defendant fired him because of his race in violation of Title VII.⁷⁴ The district court concluded that Hicks had proved a prima facie case by a preponderance of the evidence.⁷⁵ This proof shifted the burden of production to the defendant to articulate legitimate nondiscriminatory reasons for the discharge. The defendant presented evidence that the defendant had fired Hicks because he had repeatedly violated the rules, subjecting himself to discipline.⁷⁶ The court concluded that the defendant's alleged reason for discharging the plaintiff was pretextual.⁷⁷ It noted that similar and even more serious violations of the rules committed by Hicks's coworkers did not lead to their dismissals.⁷⁸ In fact, Hicks was the only supervisor who was fired and disciplined for these violations.⁷⁹

Even though the court found that the defendant's reasons for firing Hicks

⁷¹ See *id.* at 214.

⁷² See *id.* at 214–15.

⁷³ 509 U.S. 502 (1993).

⁷⁴ See *id.* at 504.

⁷⁵ See *id.* at 506.

⁷⁶ See *id.* at 508.

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ See *id.*

were pretextual, it held for the defendant because the plaintiff had not proved that the defendant's reasons were a pretext for *discrimination*.⁸⁰ According to the trial court, the plaintiff had merely proved that the defendant was lying in its defense; he had not proved that the firing was racially, rather than personally, motivated.⁸¹ Given that neither the plaintiff nor the defendant had proffered any evidence that there was any personal animus against the plaintiff, this was a curious result. The Court of Appeals for the Eighth Circuit reversed, concluding correctly that according to *McDonnell Douglas* and *Burdine* and a whole line of cases following *Burdine*,⁸² once a plaintiff proves that the defendant's articulated reason for the employment decision is pretextual, the verdict must go to the plaintiff.⁸³

This result is undeniably correct under *Burdine*. *Burdine* sought to frame the factual issues with specificity so that the plaintiff would have a "full and fair opportunity to demonstrate pretext."⁸⁴ Without this requirement of specificity and the plaintiff's automatic victory upon proving the defendant's reason pretextual, the plaintiff would have to disprove reasons for the defendant's action that the defendant had not even presented. Since it is the plaintiff's ultimate burden to prove discrimination, this result would be extremely onerous on the plaintiff. It would require the plaintiff to prove direct evidence of discriminatory intent or to raise and disprove every possible legitimate nondiscriminatory reason the defendant may have had for firing the plaintiff.

Unfortunately for Melvin Hicks and other employment discrimination plaintiffs, the Supreme Court reversed the Eighth Circuit's decision, and in a disingenuous opinion by Justice Scalia,⁸⁵ concluded that even though the

⁸⁰ *See id.*

⁸¹ *See id.*

⁸² *See, e.g., United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983).

⁸³ *See Hicks v. St. Mary's Honor Ctr.*, 970 F.2d 487 (8th Cir. 1992), *rev'd*, 509 U.S. 502 (1993).

⁸⁴ *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248; 256 (1981).

⁸⁵ Justice Scalia denied that he was making any change in the law even though the law had been settled for almost twenty years. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 512 (1993). The dissent in *St. Mary's* notes:

But today, after two decades of stable law in this Court and only relatively recent disruption in some of the Circuits . . . , the Court abandons this practical framework together with its central purpose, which is "to sharpen the inquiry into the elusive factual question of intentional discrimination."

Id. at 525 (Souter, J., dissenting) (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.8 (1981)).

plaintiff has proved pretext, the ultimate issue of discrimination should go to the jury to decide whether the plaintiff had met her burden.⁸⁶ This is true even though the defendant never presented any evidence that the reason for the firing was personally, rather than racially, motivated. Thus, the *St. Mary's* decision, in effect, requires the plaintiff to produce direct evidence of discrimination or to rebut all of the potential reasons for firing her, even those never articulated by the defendant. Furthermore, it would permit the jury to infer that the defendant fired the plaintiff because of its personal dislike for the plaintiff, even if there is not one scintilla of evidence to support this inference.

This result is clearly wrong. A finding that the defendant acted out of personal animosity is not a complete defense to an employment discrimination case. *The cause of the personal animosity is relevant to the question of whether the defendant had discriminated against the plaintiff. If the personal animosity stemmed from racism, the plaintiff should logically prevail in a race discrimination claim.* But because there is no evidence of personal animosity presented by the defendant, the plaintiff is unaware that he needs to rebut this defense with a showing that the defendant harbored ill-will against him because of his race. Thus, by requiring the plaintiff to prove that the defendant's articulation was a pretext for discrimination, the Court drained the *McDonnell Douglas* approach of any real meaning.

St. Mary's is a perfect illustration of the problems inherent in the reasonable enforcement of the civil rights laws. There are three systemic causes responsible for the result in *St. Mary's*: the underlying employment at will doctrine, the plaintiff's burden of proof, and the requirement that the plaintiff prove discriminatory intent.

a. *Employment at Will: Rewarding Bad Acts*

Because the employment discrimination law is a very narrow exception to the employment at will doctrine, judges deciding employment discrimination cases often rely on the employment at will doctrine to defeat the plaintiff's case. In essence, these courts conclude that the employer has a "license to be mean."⁸⁷ By this I mean judges often rely on the employment at will doctrine to conclude that the mere fact that the plaintiff proved that he was wrongfully discharged is insufficient to establish illegal discrimination.⁸⁸ Often the courts

⁸⁶ See *id.* at 519.

⁸⁷ Ann C. McGinley and Jeffrey W. Stempel, *Condescending Contradictions: Richard Posner's Pragmatism and Pregnancy Discrimination*, 46 FLA. L. REV. 193, 211 (1994).

⁸⁸ See, e.g., *Independence Bank v. Wyskocil*, 771 F. Supp. 1510, 1513 (C.D. Calif. 1991) (holding that an unfair or immoral reason for firing a person is not age discrimination); see also *Visser v. Packer Eng'g Assocs., Inc.*, 924 F.2d 655 (7th Cir. 1991) (en banc).

are unwilling to permit a jury to infer that the employer's negative animus is based in discrimination.⁸⁹

A particularly interesting example of this phenomenon is Judge Richard Posner's opinion in *Visser v. Packer Engineering Associates, Inc.*⁹⁰ In *Visser*, the plaintiff alleged that the defendant had violated the ADEA⁹¹ by firing him when he was sixty-four years old, only nine months before his pension would fully vest, depriving him of two-thirds of his pension benefits.⁹² The defendant company had gone through a bitter dispute over the conduct of Dr. Kenneth Packer, the company's founder and chief executive officer, who allegedly had stolen money from the firm.⁹³ Visser was a dissident member of the board who brought a shareholder's derivative action against the corporation.⁹⁴ When other dissidents left the company to form their own firm, Visser remained and Packer demanded that Visser pledge loyalty to him. Visser refused and was fired.⁹⁵

Visser arose three years before *Hazen Paper Co. v. Biggins*⁹⁶ which held that firing an employee because his pension is about to vest is not age discrimination under the ADEA. At the time the Seventh Circuit decided *Visser*, a number of courts had concluded that firing an elderly employee to produce a financial savings to the company constituted illegal age discrimination.⁹⁷ In *Visser*, Posner assumes for the sake of argument that firing an elderly employee in order to deprive him of his pension is violative of the ADEA.⁹⁸ Despite this assumption, however, he concludes that the district court appropriately granted summary judgment to the defendant.⁹⁹ Posner reaches this conclusion by relying on the employment at will doctrine. He agrees that the plaintiff was wrongfully fired, concluding that Packer, who was stealing from the firm, had no right to demand personal loyalty from his employee because personal loyalty to him would require disloyalty to the firm.¹⁰⁰ But Posner disagrees that there was evidence to prove that Packer fired Visser to

⁸⁹ See, e.g., *Visser*, 924 F.2d at 658 (described *infra* notes 90-107 and accompanying text).

⁹⁰ 924 F.2d 655 (7th Cir. 1991) (en banc).

⁹¹ See *id.* at 655.

⁹² See *id.* at 657.

⁹³ See *id.* at 656.

⁹⁴ See *id.*

⁹⁵ See *id.* at 656-57.

⁹⁶ 507 U.S. 604 (1993).

⁹⁷ See, e.g., *Jardien v. Winston Network, Inc.*, 888 F.2d 1151, 1157 (7th Cir. 1989); *White v. Westinghouse Elec. Co.*, 862 F.2d 56, 62 (3d Cir. 1988); *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1207 (7th Cir. 1987).

⁹⁸ See *Visser*, 924 F.2d at 658.

⁹⁹ See *id.* at 660.

¹⁰⁰ See *id.* at 657.

deprive him of his pension benefits.¹⁰¹

In fact, Judge Posner stresses that the plaintiff's showing that Kenneth Packer was "a monster of vengefulness"¹⁰² creates an inference that no age discrimination occurred.¹⁰³ He reasons that a person who is so vengeful would unlikely retain a younger employee who had refused to pledge loyalty to him.¹⁰⁴ Posner reaches this conclusion despite the existence of three affidavits showing that Visser was replaced with a twenty-nine year old employee and that Packer was well aware of Visser's situation—that his pension would soon fully vest.¹⁰⁵ Posner emphasizes that there was absolutely no evidence of age discrimination. Posner states that the evidence

may show that Packer is a bad man. It does not show or even tend to show that Visser was fired because of his age. It tends if anything to show the opposite, because if Visser was fired because of his disloyalty to Packer the natural though not inevitable inference is that he was not fired because of his age. Certainly his age had nothing to do with the direction of his loyalties.¹⁰⁶

Particularly because this case was decided on a motion for summary judgment, one can raise serious objections to Posner's decision, as three judges did in their dissents.¹⁰⁷ But my purpose here is not to quibble with Posner's analysis. Posner's decision demonstrates that discrimination suits hang by a very thin thread. Underlying and undermining those suits is the employment at will doctrine, which will defeat an employee's suit even though the employee was wrongfully fired. In reality, the employer-employee relationship is so complex that normally a number of intertwined events, experiences, and motivations drive a decision to discharge an employee. Requiring an employee to separate these motivations is nearly impossible, especially since the employment at will doctrine underlying the relationship sanctions discharges for reasons other than those prohibited by law.¹⁰⁸

In *St. Mary's*, the lower court also relied on the existence of the employment at will doctrine to defeat the plaintiff's case,¹⁰⁹ a reliance that was

¹⁰¹ See *id.* at 658.

¹⁰² *Id.* at 660.

¹⁰³ See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ See *id.* at 659.

¹⁰⁶ *Id.* at 657.

¹⁰⁷ See *id.* at 660–63 (Flaum, Bauer, Cudahy, JJ., dissenting).

¹⁰⁸ The mixed motives approach to proof attempts to correct for this problem, but it still requires an artificial proof—the separation of motives that probably cannot be divided. See 42 U.S.C. § 2000e-2(m) (1994).

¹⁰⁹ See *Hicks v. St. Mary's Honor Ctr.*, 756 F. Supp. 1244, 1252 (E.D. Mo. 1991),

upheld by the Supreme Court.¹¹⁰ Without the employment at will doctrine and the inherent notion that the employer has a right to fire an employee for a bad reason or for any reason so long as it is not an illegal reason, the trial judge in *St. Mary's* could not have introduced the possibility of personal animosity as a legal excuse for the discharge. But *St. Mary's* goes well beyond *Visser*. Ironically, in *St. Mary's*, it was the *judge* who first introduced the personal animosity defense.¹¹¹ *St. Mary's* Honor Center did not rely on this defense. Instead, it testified at trial that it fired Melvin Hicks for violating company rules, testimony which was later found to be untruthful by the factfinder.¹¹²

The Court in *St. Mary's* would defend its ruling by stating that the plaintiff did not meet his burden of proof. Because defendant's lying about its reason for firing the plaintiff is consistent with both a finding of discriminatory treatment and a finding that the defendant did not like the plaintiff, the jury should decide whether the defendant fired the plaintiff out of personal animosity or due to discrimination.

This reasoning demonstrates my point. Without permission to make decisions based on personal animosity, a permission granted by the employment at will doctrine, the defendants in both *Visser* and *St. Mary's* would likely have lost their cases. Moreover, as we shall see below, the combination of the plaintiff's burden of proof, the requirement that the plaintiff prove discriminatory intent, and the underlying employment at will doctrine places deserving plaintiffs who possess no direct evidence of discrimination in a precarious position. Without the protections afforded by the now defunct *McDonnell Douglas* approach, these three factors conspire to deprive deserving plaintiffs of their ability to prove their cases.

The courts are unlikely to embrace a new protective standard or revive the *McDonnell Douglas* formula. Due to political¹¹³ and economic factors¹¹⁴ there is a strong pressure on the federal courts to limit the force of the employment discrimination cases, creating a constant but subtle erosion of the employment discrimination laws.¹¹⁵ There is little judicial incentive to read more protections into the law. Therefore, it seems a bolder approach may be the only answer. So long as the civil rights law is an exception to the employment at will doctrine, "protected" employees will have inadequate protection.

rev'd, 970 F.2d 487 (7th Cir. 1992), rev'd, 509 U.S. 502 (1993).

¹¹⁰ See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 514 (1993).

¹¹¹ See *Hicks*, 756 F. Supp. at 1252.

¹¹² See *id.*

¹¹³ See *infra* Part II.C.4.a.

¹¹⁴ See *infra* Part II.C.4.b.

¹¹⁵ See generally McGinley, *supra* note 4.

b. *Plaintiff's Burden: Impossible Proof*

Placing the burden on the plaintiff to prove intentional discrimination creates very difficult problems of proof that benefit the employer. If the employer in *St. Mary's*¹¹⁶ had the burden of proving that it did not intentionally discriminate against the plaintiff when it fired him, there would have been no doubt about the result. The defendant would have argued that it fired the plaintiff for violating company rules. Because the lower court found that this reason was pretextual, the defendant would not have been able to sustain its burden of proof. The plaintiff would have prevailed. Because the employer has access to the information concerning the plaintiff's discharge, it makes more sense to place the burden of proof on the employer.¹¹⁷ This is particularly true when the case hinges on issues of intent. There is support for placing the burden of proof on the employer. In labor arbitrations and many wrongful discharge suits, the employer traditionally carries the burden of proving that there was just cause for the employee's dismissal.¹¹⁸

c. *The Inappropriate Intent Requirement*

^o Placing the burden of persuasion on the employee is particularly problematic because the law requires the plaintiff to prove the employer's *discriminatory intent*. The intent requirement¹¹⁹ creates substantive and procedural difficulties that seem to defeat the intended purpose and goals of the statute. The legislative purpose in passing the employment discrimination laws

¹¹⁶ 509 U.S. 502 (1993).

¹¹⁷ In the insurance context, it is the insurance company's burden to prove that it was harmed by the insured's failure to notify it of the claim in a timely manner. See JEFFREY W. STEMPEL, *INTERPRETATION OF INSURANCE CONTRACTS: LAW AND STRATEGY FOR INSURERS AND POLICY HOLDERS* 698-711 (1994).

¹¹⁸ See FRANK ELKOURI & EDNA ELKOURI, *HOW ARBITRATION WORKS* 7-76 (Cum. Supp. 1985-89).

¹¹⁹ The 1964 Act states in relevant part:

If the court finds that the respondent has *intentionally* engaged in or is *intentionally* engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g)(1) (1994) (emphasis added).

was to deter discriminatory behavior¹²⁰ in order to provide equal work opportunities for all Americans and to compensate victims of discrimination in the workplace.¹²¹ Requiring proof of discriminatory intent does not further either of these goals; in fact, scholars have argued that the intent requirement reinforces the perpetrator's perspective of the law, and undermines the goals of the statute by legitimizing discrimination that is not obviously intentional.¹²² Legitimization occurs because the law requires a search for a moral culprit.¹²³ To the extent the plaintiff cannot prove discriminatory intent, the law presumes that no discrimination has occurred; the individual employer and the rest of society are relieved of moral culpability for the discrimination. Where there is sufficient proof that the employer intentionally discriminated against the employee, society has found its sinner and can acquit itself of responsibility for racism or sexism. This paradigm encourages an extremely narrow definition of racism, exonerating any racism that occurs outside of the narrow confines of an individual's invidious intent.¹²⁴

Although somewhat ambiguous, the legislative history of the intent requirement suggests that Congress did not contemplate its meaning or effect. Initially, the House version of the 1964 Act did not include the requirement that courts find an intent to discriminate.¹²⁵ The Senate amendment added the intent

¹²⁰ See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 526 (1993) (Souter, J., dissenting).

¹²¹ See *id.*

¹²² See generally Crenshaw, *supra* note 19; Allan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (arguing that by focusing on the intent of the individual wrongdoer and causation, the law adopts the "perpetrator's perspective" which morally vindicates the rest of society which is responsible for structural discrimination against blacks).

¹²³ See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1167 (1995) ("Every successful disparate treatment story needs a villain.").

¹²⁴ See generally Freeman, *supra* note 122.

¹²⁵ See LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 3001, 3006 (United States Equal Employment Opportunity Comm'n. ed., 1968). The House Bill, when it moved to the Senate, did not go through the usual committee procedure. Instead, a substitute bill with amendments was worked out in informal bipartisan conferences with the Majority Leader (Mansfield) and the Minority Leader (Dirksen), and Senators Humphrey and Kuchel as the principals. See *id.* at 3001. The Substitute Bill, No. 656, was voted on in the Senate and sent directly to the House floor to vote on the bill without going to Conference Committee. The authors of the bill agreed on this procedure in order to avoid a filibuster. See *id.* at 3001, 3010. For this reason, there is no Senate Committee Report. Instead, there is a record of the floor debates in the Senate and of the statements of the major authors of the bill in the Senate.

requirement as a “clarifying” change because the authors of the Senate amendment presumed that because the 1964 Act barred discrimination due to membership in a protected class, “it would seem already to require intent, and, thus, the proposed change does not involve any substantive change in the title.”¹²⁶ The author of this statement, Senator Humphrey, confused causation with the employer’s state of mind. It does not follow inexorably that intent to discriminate is necessary in order to make discriminatory employment decisions concerning members of the protected class. Senator Humphrey followed this statement with an assurance that the change in the provision would “make it wholly clear that inadvertent or accidental discriminations will not violate the title”¹²⁷ While this statement would seem to preclude the argument that intent is not necessary to prove discrimination under the 1964 Act, it still does not define “intent.” Intent could mean that the employer performed an intentional act whose foreseeable “natural and probable” consequences are to deprive members of protected classes of employment.¹²⁸ Under this definition of intent, an employer’s recruiting practices alone could subject him to charges of discrimination if they lead to a work force that does not contain representative numbers of persons from protected classes. If instead, intent requires the employer to have an invidious discriminatory purpose when it makes its employment decision,¹²⁹ this definition seems at odds with the purposes of the 1964 Act.

Interpreted this way, the intent requirement relies on a number of false assumptions that undermine the goals of the statute. First, the courts assume that it is possible to ascertain and prove an individual’s motive or intent.¹³⁰ Second, contrary to the 1964 Act’s legislative history, courts interpret the antidiscrimination statute as punitive in nature.¹³¹ Third, the courts assume that the employee is not harmed by unintentional acts of discrimination.¹³²

Proving discriminatory intent is extremely difficult for procedural and substantive reasons. As I have demonstrated above, *St. Mary’s Honor Center*

These statements, because of the unusual procedure used in formulating the 1964 Act, are considered the most authoritative statements of legislative intent. *See id.* at 3001.

¹²⁶ *Id.* at 3006 (quoting Senator Humphrey, explaining Senate substitute amendment No. 656 (June 4, 1964)).

¹²⁷ *Id.*

¹²⁸ *Personnel Adm’r v. Feeney*, 442 U.S. 256 (1979) (holding that the Equal Protection Clause of the Fourteenth Amendment requires an intent to harm the victim before discriminatory intent can be found).

¹²⁹ *See id.*

¹³⁰ *See infra* notes 134–53 and accompanying text.

¹³¹ *See infra* notes 154–73 and accompanying text.

¹³² *See infra* pp. 1472–73.

has created significant procedural barriers.¹³³

Substantive barriers may be even greater. The discriminatory intent requirement does not reflect the reality of how decisions are made in the workplace, thus failing to account for complex psychological and cognitive factors that influence an employer's decision.¹³⁴ It rests on the false assumption that an employer who discriminates against an employee due to her membership in the protected class is conscious of the racist or sexist roots of his views toward the employee. Professor Charles Lawrence has demonstrated that racist and sexist stereotypes that are rooted in the subconscious can affect the manner in which a person processes information.¹³⁵ Since Professor Lawrence's important work, Professor David Benjamin Oppenheimer in *Negligent Discrimination*,¹³⁶ has used psychological surveys and field and laboratory studies to show that racism of whites against blacks is often unconscious. Oppenheimer reviews psychological surveys that ask direct questions about whether blacks should be treated equally in the workplace. Although the vast majority of respondents agreed with equality of job opportunity in theory,¹³⁷ many subjects in a series of experiments testing for racism exhibited a high degree of both verbal and nonverbal racist behavior resulting from adherence to racial stereotypes.¹³⁸

Studies supporting Lawrence's and Oppenheimer's theories abound.¹³⁹ White undergraduates, for example, who viewed a videotape of a black man shoving another person described the episode as violent, but when the exact same video was shown with a white man shoving another, white viewers interpreted the activity on the screen as "playing around."¹⁴⁰ Perhaps even

¹³³ See *supra* Part II.C.2.a. & b.

¹³⁴ Congress seemed to recognize, however, that employers' decisions result from multiple factors. It rejected an amendment to create liability for employment decisions made "solely" because of a person's sex, race, color, religion or national origin. See LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, *supra* note 125, at 3124 (McClellan Amendment, No. 547, June 15, 1964). The Court's interpretation in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), comes very close to adding the "solely" language back into the statute.

¹³⁵ See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

¹³⁶ See David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993).

¹³⁷ See *id.* at 904.

¹³⁸ See *id.* at 907-13 (citing several studies evaluating racist behavior).

¹³⁹ See, e.g., Benson Rosen & Thomas H. Jerdee, *The Influence of Age Stereotypes on Managerial Decisions*, 61 J. APP. PSYCH. 428 (1976); see also Oppenheimer, *supra* note 136, at 907-15 (surveying studies on racist behavior and stereotypes).

¹⁴⁰ See Oppenheimer, *supra* note 136, at 914.

more significant to the workplace, a 1990 study asked whites to compare blacks' and whites' intelligence and industriousness. Over 53% of the subjects rated African Americans as less intelligent than whites; 62.3% considered blacks less hard working than whites.¹⁴¹ Like the white subjects who consider blacks less intelligent and industrious, an employer will unknowingly rely on subconscious stereotypes when evaluating the work product of employees of different races, sexes, or ages.

In *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*,¹⁴² a very important work to the understanding of the intent requirement, Linda Hamilton Krieger uses social cognition theory to examine the constructs of proof in the antidiscrimination law. Through reference to a vast array of psychological research conducted in the past twenty years, Krieger argues that the discriminatory intent requirement is fundamentally flawed because it does not comport with the reality of how decisionmaking occurs.¹⁴³ Krieger demonstrates that discriminatory stereotyping results from a normal cognitive process of categorization rather than from the invidious motivational function presumed by the law.¹⁴⁴ This process of categorization distorts the decisionmaker's perception, memory, and recall for events that are relevant to the decision and can lead to discriminatory results even though the decisionmaker believes that he has made his decision without bias.¹⁴⁵ In fact, because of the distortion caused by categorization, it is very difficult for the decisionmaker to know the bases for the employment decision.¹⁴⁶

Krieger's research is a call to arms for those interested in the integrity of employment discrimination law; it makes clear that the concepts underlying the intent standard in the discriminatory treatment cases are based on outdated psychological theories that are no longer held by the community of psychologists doing research in cognitive theory.¹⁴⁷

Permitting employers to make employment decisions based on subconscious stereotypes or cognitive categorization that distorts the employer's perception can obviously defeat the purposes of the civil rights acts, especially where the concept of proof requires discriminatory intent. But something even more pernicious occurs. The object of the negative stereotype begins to

¹⁴¹ See *id.* at 908-09.

¹⁴² See Krieger, *supra* note 123.

¹⁴³ See *id.*

¹⁴⁴ See *id.* at 1164.

¹⁴⁵ See *id.*

¹⁴⁶ See *id.*

¹⁴⁷ See *id.*

conform his behavior to that expected by the stereotype.¹⁴⁸ Thus, the antidiscrimination law not only uses the improper measure to determine whether employees are discriminated against in the workplace, reinforcing the employer's belief that he is not discriminating against the employee, but the law also creates the negative behavior in the victim. The law has a circular effect: it legitimizes discrimination by exonerating an employer who has discriminated and acquits the society that has reinforced the subconscious negative stereotypes in the employer while simultaneously reinforcing the stereotype by creating behavior in the victim that conforms to the stereotype.¹⁴⁹

Although the law tries to prevent employers from making decisions based on stereotypes about members of the protected classes, currently it reaches only the cases where the employer has made overt remarks reflecting a stereotype about a member of a protected group. In *Price Waterhouse v. Hopkins*,¹⁵⁰ for example, the Court held that differential treatment of an employee, because she does not meet a stereotype about how a woman should dress and act, is sex discrimination. Hopkins, an accountant for the Big Eight accounting firm was denied a partnership in the firm, in part, because she acted too aggressively for a woman and did not dress or act in a feminine manner.¹⁵¹ *Price Waterhouse* was an easy case, however, compared to most. In many individual discrimination cases, the employer's perception and views of his employee's merit are filtered through his cognitive function, reinforcing stereotypes existing at the subconscious level that never surface during the relationship between employer and employee.¹⁵² Where there is no outward expression of the employer's conscious or subconscious use of stereotypical views in its decisionmaking, the employee has no evidence of discriminatory treatment. In fact, Krieger posits that unless the employer is motivated by an invidious desire to harm a member of the protected class or expresses a stereotypical belief about the person's ability to do the job based on membership in a protected class, there will be no evidence of discrimination because the employer has unknowingly selectively interpreted the information he receives concerning the employee's ability to do the job.¹⁵³

My second criticism of the intent requirement is that it relies on a false assumption that a finding of discrimination is punitive in nature even though

¹⁴⁸ See Mark Snyder, *On the Self-Perpetuating Nature of Social Stereotypes*, in COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR 183 (David L. Hamilton ed., 1981).

¹⁴⁹ See *id.* at 193-210.

¹⁵⁰ 490 U.S. 228 (1989).

¹⁵¹ See *id.* at 228, 232.

¹⁵² See generally Krieger, *supra* note 123.

¹⁵³ See *id.* at 1186-1217.

nowhere in the legislative history is there reference to punishment as a justification for the law.¹⁵⁴ Had the courts focused on the dual purposes of compensation and deterrence articulated in the legislative history of Title VII,¹⁵⁵ the intent requirement would not be interpreted as it has been. In interpreting the 1964 Act, courts should consider whether proof of discriminatory intent would appropriately lead to maximum deterrence of discriminatory behavior and equal opportunity, as well as providing a remedy to victims.

In tort law, courts have used a negligence rather than an intent standard to maximize deterrent effect. In *Negligent Discrimination*, Professor Oppenheimer argues for the application of a negligence standard to Title VII cases.¹⁵⁶ Oppenheimer notes that there are already areas of Title VII law, such as hostile work environment in sexual and racial harassment, that employ negligence theories.¹⁵⁷ He argues that a negligence rather than an intentional tort standard in Title VII disparate treatment cases is appropriate because the psychological literature strongly suggests that employers make discriminatory decisions without realizing that they are discriminating.¹⁵⁸ Oppenheimer would hold an employer liable for negligent discrimination "[w]hensoever [it] fails to act to prevent discrimination which it knows, or should know, is occurring, which it expects to occur, or which it should expect to occur."¹⁵⁹ He would also impose liability for an employer's breach of a standard of care established by statute if the employer makes employment decisions that are based on seemingly neutral processes having a discriminatory effect.¹⁶⁰

To the extent that a negligence standard would increase deterrence by encouraging more employers to examine their employment decisions, I would endorse such a standard. But Professor Oppenheimer's article fails to address the types of proof that would be available to find an employer liable under a negligence standard. For example, consider *St. Mary's*.¹⁶¹ It is possible that the employer in that case subconsciously assigned to Mr. Hicks negative attributes that he did not assign to Mr. Hicks's coworkers. The supervisor might have read Mr. Hicks's infractions in a more negative way because, either consciously or unconsciously he believed in the common stereotype that

¹⁵⁴ See generally LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, *supra* note 119.

¹⁵⁵ See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975).

¹⁵⁶ See Oppenheimer, *supra* note 136.

¹⁵⁷ See *id.* at 934-67.

¹⁵⁸ See *id.* at 967-72.

¹⁵⁹ *Id.* at 969.

¹⁶⁰ See *id.* at 969-70.

¹⁶¹ *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

African Americans are not as industrious as whites. To the extent, however, that the supervisor is unaware of his own biases, the question is how the negligence standard would help. If the standard were that a reasonable employer would have looked at Mr. Hicks's violations and those of his coworkers, and, if unable to justify different treatment, would not have followed through with Mr. Hicks's discharge, the standard may work. Without a shift in the burden of persuasion, however, this standard may not improve the lot of employees who experience discrimination.¹⁶²

Moreover, to the extent that a negligence standard would require an employer to know the subjective reason for his behavior, it may not be in accord with the psychological literature available today. According to Krieger, social cognition theory suggests that instead of imposing a proscriptive duty not to discriminate as the law does currently, the law should impose a "prescriptive duty to identify and control for errors in social perception and judgment which inevitably occur, even among the well-intended."¹⁶³ But Krieger hesitates to recommend the adoption of a duty to prevent oneself from operating in a discriminatory fashion because she believes that cognitive theory has not established the methods for reducing cognitive-based judgment errors.¹⁶⁴ Professor Susan T. Fiske, a psychologist from the University of Massachusetts, would likely disagree with Krieger's conclusion. In a work predating Krieger's article, Dr. Fiske argues that even though stereotyping results from cognitive processes, the actor has the ability to control whether he or she acts as a result of stereotyping.¹⁶⁵ Dr. Fiske defines intent differently from the way the law normally does. She would find that a person acts intentionally if the actor has options that are "at least potentially cognitively available to the individual."¹⁶⁶ According to Dr. Fiske, a person can intend an act subconsciously so long as the alternative to the choice made is controllable. Dr. Fiske offers an example to explain this definition of intent: a person sees a middle-aged black woman on a suburban street and decides that she is a housekeeper. Although the individual reaching this conclusion does not consciously consider the inference, if asked, he would have to admit that there are alternative ways of thinking about the black woman. According to Dr. Fiske, the individual should be responsible for

¹⁶² This is not to say that a negligence standard is unworkable; my concern is that by not using examples, Oppenheimer has not demonstrated how it would work.

¹⁶³ Krieger, *supra* note 123, at 1245 (emphasis omitted).

¹⁶⁴ *See id.*

¹⁶⁵ *See* Susan T. Fiske, *Examining the Role of Intent: Toward Understanding Its Role in Stereotyping and Prejudice*, in UNINTENDED THOUGHT 253 (James S. Uleman & John A. Bargh eds., 1989).

¹⁶⁶ *Id.* at 259.

the stereotype even though he did not consciously rely on it.¹⁶⁷ In contrast, according to Dr. Fiske, a small child who has been seriously misinformed may be unaware that there are alternatives to thinking about the middle-aged black woman. The child's stereotype, therefore, would not be intentional and would not carry legal responsibility with it.¹⁶⁸

Rather than use the law's definition of intent, one could possibly hold an employer liable for failure to fulfill an affirmative duty to an employee. The source of this duty would be analogous to the duty required in the "special relationship" created in tort law where the relationship between the plaintiff and the defendant creates a duty to act affirmatively.¹⁶⁹ Dr. Fiske's definition of intent as the choice between a potentially cognitively available set of alternatives would encompass a much wider scope of actions while holding an employer responsible only for actions which, if he considered them, he could control. In creating such a duty, however, the legislature should pay close attention to the psychological literature. For example, a study by psychology professors Randall Gordon, Richard Rozelle, and James Baxter demonstrates that persons who have greater accountability and responsibility for hiring tend to rely more heavily on stereotypes than those who do not bear the sole burden of making

¹⁶⁷ See *id.* at 260.

¹⁶⁸ See *id.*

¹⁶⁹ See RESTATEMENT (SECOND) OF TORTS § 323 (1965). Section 323 states:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

- (a) his failure to exercise such care increases the risk of such harm, or
- (b) the harm is suffered because of the other's reliance upon the undertaking.

Id.; see also *Miller v. United States*, 530 F. Supp. 611 (E.D. Pa. 1983), *aff'd*, 729 F.2d 1448 (3d Cir. 1984) (finding that executor of estate of informant in the Federal Protection Program had a cause of action against the government for failure to protect the informant because of the special relationship between the government and the informant).

One could argue that an employer who undertakes to employ a member of a protected group also takes upon itself the responsibility to examine the company's processes in order to assure that the process in which the members of the protected group are evaluated is not tainted by unconscious prejudice.

Of course, Congress, while writing the 1964 Act, did not consider the possibility of a special relationship because of its focus on discriminatory hiring rather than on discriminatory discharges. See H.R. REP. 88-914 (1963), *reprinted in* LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, *supra* note 125, at 2001, 2147-51, *also reprinted in* 1964 U.S.C.A.N. 2355, 2513-17.

the hiring decision.¹⁷⁰ The authors of the study point out that these results are counterintuitive because "[p]ublic policy generally assumes that accountability in the form of record keeping and peer review will minimize bias."¹⁷¹ Other studies demonstrate that where there are no stereotypes upon which to rely, and the expected response is unknown, accountability will tend to enhance the accuracy of the information used in making the employment decision.¹⁷² The Gordon, Baxter, and Rozelle study suggests that processes in the workplace that in the past have been used to justify employment decisions may, in fact, create more of a reliance on stereotyping. Of course, maximum deterrence would likely result from strict liability and one could argue that employers should be strictly liable for their failure to hire, maintain, and promote a number of members of the protected classes proportional to their presence in the labor pool. Although this standard may be more efficient, a strict liability theory may require employers to establish statistical quotas that would likely create an even greater backlash than the one the country is observing today in the affirmative action debate.¹⁷³

Finally, the notion underlying the intent requirement—that employees are not harmed by unconscious discrimination—is also false. Employees are just as likely to be harmed by a dismissal due to unconscious racism as by a consciously made racist dismissal. Economic harm will result from the firing whether it is racially motivated or not. I do not contend that all dismissals are equal because a member of a protected class suffers an inherent additional harm if his or her dismissal is due to conscious consideration of illegitimate factors. But the degree to which one suffers from a racist or sexist dismissal may not be at all related to whether the person dismissing the employee *intended* to harm her because of race or sex. In fact, the most hurtful dismissal may be a sexist or racist one stemming from the employer's subconscious, or errors made by the employer during cognitive processing. Precisely because the employee feels the discrimination but the employer denies its occurrence, these dismissals may be the most confusing and difficult for the employee who loses her job.

In contrast, if an employer harbors conscious racist or sexist thoughts or attitudes but does not treat the employee any differently from his or her other employees, the employer's intentional racism or sexism may not harm the employee. In fact, this employer might be more careful about his or her treatment of the employee in order to avoid illegal action.

¹⁷⁰ See Randall A. Gordon et al., *The Effect of Applicant Age, Job Level, and Accountability on Perceptions of Female Job Applicants*, 123 J. PSYCH. 59, 66-67 (1989).

¹⁷¹ *Id.* at 67.

¹⁷² See *id.*

¹⁷³ See *infra* Part II.C.4.d.

Returning to *St. Mary's*,¹⁷⁴ if the plaintiff had not borne the burden of proving the defendant's discriminatory intent, he would likely have prevailed. Instead of focusing on intent, the plaintiff would have demonstrated that he was treated differently from other nonminority employees who committed the same violations. Even if the intent requirement alone would not have made a difference in *St. Mary's*, the intersection of the employment at will doctrine, the plaintiff's burden of proof, and the intent requirement defeated the plaintiff's claim. Had these three factors not coincided, Mr. Hicks would have won his case.

Even before *St. Mary's*, the lower courts regularly distorted the substantive standards of proof set forth by *McDonnell Douglas*¹⁷⁵ by granting summary judgment inappropriately in discrimination cases. I have already written an article on summary judgment in Title VII and ADEA cases, and will not belabor the point,¹⁷⁶ but as I have already demonstrated, courts analyze circumstantial evidence in a piecemeal fashion, draw reasonable inferences in the defendant's favor when the defendant is the movant on a motion for summary judgment, and make credibility determinations in the defendant's favor.¹⁷⁷

The *Credulous Courts* article also demonstrates how the lower courts have recently distorted the substantive requirements of Title VII.¹⁷⁸ This distortion culminated with *St. Mary's*. The misinterpretation of the substantive standards of both Title VII and the ADEA and the aggressive improper granting of summary judgment in these cases are inextricably linked and have contributed to the denial of many rights to civil rights plaintiffs.

3. Gilmer's Legacy: Arbitrary Arbitrations

While *St. Mary's* dismantled the *McDonnell Douglas* standard, making it very difficult to prove discrimination through circumstantial evidence, *Gilmer v. Johnson/Lane Interstate Corp.*¹⁷⁹ deprives civil rights plaintiffs of their right to bring discrimination suits against their employers before a jury in federal court.

Gilmer dealt with the intersection of the Federal Arbitration Act ("FAA")¹⁸⁰ and the ADEA.¹⁸¹ Before *Gilmer*, it was widely accepted that suits

¹⁷⁴ *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

¹⁷⁵ See *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

¹⁷⁶ See generally McGinley, *supra* note 4.

¹⁷⁷ See *id.*

¹⁷⁸ See *id.*

¹⁷⁹ 500 U.S. 20 (1991).

¹⁸⁰ See 9 U.S.C. §§ 1-16 (1994).

brought pursuant to the federal discrimination laws were not precluded by arbitration. In *Alexander v. Gardner-Denver, Co.*,¹⁸² the Court held that an employee who had a Title VII action against his employer could maintain the civil rights action in federal court even though the discrimination issue had been arbitrated previously as part of the union's arbitration process.¹⁸³ The *Gilmer* Court distinguished *Alexander* on three bases. First, the Court noted that in *Alexander*, the question was whether the plaintiff's arbitration of his contract claims precluded him from subsequently bringing suit in court to enforce his rights under Title VII; it did not revolve around the enforceability of a contract to arbitrate statutory claims.¹⁸⁴ Because in *Alexander* the employees had not agreed to arbitrate the statutory claims, the arbitrator had no authority to decide the statutory claims.¹⁸⁵ Second, where the arbitration occurs in the union context, the Court noted the tension between the rights of the individual to be free from discrimination and the collective rights under the collective bargaining agreement.¹⁸⁶ The Court implied that the union representatives in the negotiation process cannot agree to waive the right of the individual to bring his statutory claim in the forum he chooses.¹⁸⁷ Finally, the Court noted that the FAA, a statute which reflects a liberal policy toward arbitration,¹⁸⁸ was not a consideration in *Alexander*.

In *Gilmer*, the plaintiff was the defendant's Manager of Financial Services.¹⁸⁹ As a condition of his employment, Gilmer registered with the New York Stock Exchange ("NYSE").¹⁹⁰ By signing the registration application, Gilmer agreed to submit to arbitration any claim between himself and Interstate "that is required" by the rules of the NYSE.¹⁹¹ Rule 347 of the NYSE requires arbitration of "[a]ny controversy between a registered representative and any . . . member organization arising out of the employment or termination of employment of such registered representative."¹⁹²

Gilmer was fired, after six years working for the defendant, at the age of 62.¹⁹³ When he brought his age discrimination case against Interstate under the

¹⁸¹ See 29 U.S.C. §§ 621-634 (1994).

¹⁸² 415 U.S. 36 (1974).

¹⁸³ See *id.* at 59-60.

¹⁸⁴ See *Gilmer*, 500 U.S. at 35.

¹⁸⁵ See *id.*

¹⁸⁶ See *id.*

¹⁸⁷ See *id.*

¹⁸⁸ See *id.*

¹⁸⁹ See *id.* at 23.

¹⁹⁰ See *id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ See *id.*

ADEA, Interstate moved to dismiss and to compel arbitration based on the arbitration clause.¹⁹⁴ The district court denied Interstate's motion to compel arbitration, but the Fourth Circuit reversed.¹⁹⁵

The Supreme Court held that Gilmer was required to arbitrate his discrimination claim against his former employer.¹⁹⁶ Noting that Gilmer was a businessman, the Court rejected the argument that the unequal bargaining power between the parties prevented Gilmer from knowingly and voluntarily waiving his right to a jury trial as provided for in the ADEA.¹⁹⁷

The Court's opinion is troublesome for a number of reasons. First, it is unclear whether Gilmer actually knew that he was waiving his right to a jury trial if the defendant were to engage in age discrimination. Nothing in the opinion even suggests that Gilmer read Rule 347 at the time he registered. If the Court intended to require that the employee's waiver be knowing and voluntary, it would have remanded the case for a factfinding hearing to ascertain if Gilmer's agreement was in fact knowing and voluntary.¹⁹⁸

Even if Gilmer knew that by registering with the NYSE he waived his right

¹⁹⁴ See *id.* at 24.

¹⁹⁵ See *id.*

¹⁹⁶ See *id.* at 35.

¹⁹⁷ See *id.* at 33. The Court also refused to reach the question of whether section 1 of the FAA excludes all employment contracts from the reach of the statute. See *id.* at 25 n.2. Section 1 provides: "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1994).

A majority of the courts of appeals have interpreted this provision narrowly to exclude only persons working in the actual transportation or movement of goods in interstate commerce. See, e.g., *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) (limiting exclusion to employees working in the transportation industry); *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am.*, 207 F.2d 450, 453 (3d Cir. 1953) (same). These interpretations are probably not proper statutory interpretation. See Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259 (1991) (arguing that limiting the exception to workers in the transportation industry lacks substantial support under all of the schools of statutory interpretation).

In *Gilmer*, the Court skirted the question of whether this interpretation is proper; it concluded that section 1 did not exclude the contract from FAA coverage because the arbitration provision was not a part of his *employment* contract; rather, it was contained in the NYSE rules. See 500 U.S. at 25 n.2. Because Gilmer's contract incorporated by reference the NYSE rules, see *id.* at 23, this seems to be a distinction without a difference.

Lower courts since *Gilmer* have held uniformly that the FAA may be invoked to compel arbitration of employment disputes. See, e.g., *Hull v. NCR Corp.*, 826 F. Supp. 303 (E.D. Mo. 1993); *DiCrisci v. Lyndon Guar. Bank of N.Y.*, 807 F. Supp. 947 (W.D.N.Y. 1992).

¹⁹⁸ See Stempel, *supra* note 197, at 273.

to have his civil rights claim decided by a jury, he had little recourse. The industry requirement that its employees forego their rights to a jury trial deprives industry employees of bargaining power. The only choice for persons who are troubled by the arbitration requirement is to work outside of the industry. Thus, the United States Supreme Court permits a whole sector of industry to defeat the rights of its employees by forcing the employees to arbitrate their statutory civil rights claims. A job applicant who desires to work in the securities industry will likely sign the agreement in order to procure employment. This signature may be knowing, but it cannot be characterized as voluntary.

Moreover, by its rejection of *Gilmer*'s argument that the arbitration process is biased against employees,¹⁹⁹ the Court takes a formalist approach to the problems employees commonly face before arbitration panels in the securities industry. The *Gilmer* Court cavalierly relied on NYSE arbitration rules to provide protection against biased panels,²⁰⁰ but this reliance is sorely misplaced. NYSE arbitrators are known for their bias in favor of the employer in employment discrimination cases, and their failure to understand or to apply discrimination law properly.²⁰¹

Compounding the problem is the arbitrators' power, which far exceeds that of federal district court judges. The standard of review is extremely narrow—a court can overturn an arbitration decision only “[w]here there [is] evident partiality or corruption in the arbitrators.”²⁰² This standard does not provide for reversal even where the arbitrator uses improper legal standards.²⁰³

Gilmer has had “a substantial impact on employment litigation in the securities industry.”²⁰⁴ Employers have a greater chance of prevailing at arbitration and when there are awards against employers, they are lower than

¹⁹⁹ See *Gilmer*, 500 U.S. at 30.

²⁰⁰ See *id.*

²⁰¹ See Symposium, *New York Stock Exchange, Inc., Symposium on Arbitration in the Securities Industry: Employment Discrimination*, 63 FORDHAM L. REV. 1613, 1613–14 (comments of Judith Vladeck) (1995); Margaret A. Jacobs, *Men's Club: How Wall Street Dealt with a Sex-Bias Case*, WALL ST. J., June 9, 1994, at A1. The NYSE arbitrators' lack of preparation to decide discrimination cases is not necessarily the fault of the industry. The Court's opinion in *Gilmer* shifted the responsibility for the development of public civil rights law to securities arbitrators who had no training or experience in discrimination law. See *Symposium on Arbitration* (comments of Judith Vladeck), *supra* at 1613–14.

²⁰² 9 U.S.C. § 10 (1994).

²⁰³ See *Flender Corp. v. Techna-Quip Co.*, 953 F.2d 273, 278–79 (7th Cir. 1992).

²⁰⁴ *Securities Employers Faring Well in Mandatory Arbitration Since Gilmer*, 1993 Daily Lab. Rep. (BNA) No. 65, at A-7 (Apr. 7, 1993) (quoting Stuart Bompey, a partner of Orrick, Herrington & Sutcliffe).

court awards.²⁰⁵

The 1991 Act did not endorse the result in *Gilmer*. President Bush signed the 1991 Act on November 21, 1991, six months after the Supreme Court decided *Gilmer*.²⁰⁶ Although the 1991 Act did not specifically overturn *Gilmer*, its purpose was clearly to preserve and improve upon the protection of the civil rights of members of protected classes.²⁰⁷ It expanded the rights of victims of intentional discrimination by adding the right to collect compensatory and punitive damages,²⁰⁸ and by granting for the first time the right to a jury trial.²⁰⁹ The 1991 Act does not disapprove of arbitration, but section 118 of the 1991 Act contemplates the use of arbitration as an alternative method of resolving disputes that would supplement, not supplant, the right to a jury trial.²¹⁰ The legislative history of this section demonstrates that Senator Dole, one of the more conservative members of the Senate, intended that any waiver of a jury trial be knowing and voluntary.²¹¹

Gilmer has had quick and startling repercussions. Most of the lower courts have applied *Gilmer* reflexively to Title VII and other employment discrimination cases including claims under state law.²¹² Like the Court in *Gilmer*, these courts pay lip service to the concept of knowing and voluntary waivers, but they do not hold factfinding hearings to determine whether the plaintiff knowingly and voluntarily entered into the arbitration agreement.²¹³

²⁰⁵ See *id.* at A-8.

²⁰⁶ The Supreme Court decided *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), on May 13, 1991.

²⁰⁷ The stated purpose of the 1991 Act was: "[t]o amend the Civil Rights Act of 1964 to strengthen and improve federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes." Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1071 (1991); see also *id.* § 3 (codified as amended at 42 U.S.C. § 1981 note (1994)).

²⁰⁸ See *id.* § 102(b) (codified as amended at 42 U.S.C. § 1981a(b) (1994)).

²⁰⁹ See *id.* § 102(c) (codified as amended at 42 U.S.C. § 1981a(c) (1994)).

²¹⁰ See *id.* § 118 (codified as amended at 42 U.S.C. § 1981 note (1994)). This section states: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." *Id.*

²¹¹ 137 CONG. REC. S15478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole).

²¹² See, e.g., *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992) (holding that Title VII suit is subject to arbitration under the FAA); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991) (same); *Hull v. NCR Corp.*, 826 F. Supp. 303 (E.D. Mo. 1993) (staying Title VII, ADEA, and state human rights suit pending arbitration).

²¹³ If an employer conditions employment on the signing of the arbitration agreement, the signing is not voluntary. See, e.g., *EEOC v. River Oaks Imaging*, 67 FEP Cases (BNA) 1243 (S.D. Tex. 1995) (granting the EEOC an injunction, and preventing the defendant from

Many of these courts use section 118 of the 1991 Act to support their conclusions that the cases should go to arbitration, but ignore the requirements of the section.²¹⁴

The only notable exception to the cases requiring arbitration is *Prudential Insurance Co. of America v. Lai*,²¹⁵ a sexual harassment case with a particularly egregious fact pattern of harassment and dishonesty. In *Lai*, the plaintiffs alleged that when they applied for their jobs as sales representatives, they were required to sign U-4 forms containing agreements to arbitrate any dispute required to be arbitrated under organizations with which they would subsequently register.²¹⁶ Plaintiffs subsequently registered with the National Association of Securities Dealers ("NASD"), which required that business disputes be arbitrated.²¹⁷

Plaintiffs alleged that at the time they filed the U-4 agreements, Prudential told them that the forms were applications to take a required test, never giving the plaintiffs an opportunity to read the forms.²¹⁸ Plaintiffs further alleged that Prudential simply directed them to sign the papers, never mentioned arbitration and never gave plaintiffs a copy of the NASD Manual, which contains the actual terms of the arbitration agreement.²¹⁹ Later, when the employees brought their sexual harassment claims in state court against the employer, the defendant brought a separate suit in federal court asking the court to compel arbitration of the state law claims and to stay the state court proceedings.²²⁰ The federal district court granted the defendant's motion.²²¹

On appeal, the Ninth Circuit held that an employee could not bind herself to arbitrate her statutory claims unless she knowingly and voluntarily waived her rights to bring suit in court.²²² The Ninth Circuit relied on the legislative history of section 118 of the 1991 Act, pointing out that, "Senator Dole

requiring its employees to sign its mandatory arbitration policy); see also Margaret A. Jacobs, *Policies Requiring Arbitration Challenged*, WALL ST. J., Oct. 16, 1995, at B5. There is an even stronger argument that the waiver is not voluntary where a whole industry conditions employment on the signing of the agreement.

²¹⁴ See, e.g., *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996) (requiring arbitration of ADA claims in collective bargaining context); *Hurst v. Prudential Sec., Inc.*, No. 93-15148, 1994 U.S. App. LEXIS 6940 (9th Cir. Apr. 4, 1994) (holding Title VII claim arbitrable because of section 118).

²¹⁵ 42 F.3d 1299 (9th Cir. 1994), cert. denied, 116 S. Ct. 61 (1995).

²¹⁶ See *id.* at 1301.

²¹⁷ See *id.*

²¹⁸ See *id.*

²¹⁹ See *id.*

²²⁰ See *id.*

²²¹ See *id.*

²²² See *id.* at 1305.

explicitly declared that the arbitration provision encourages arbitration only 'where the parties knowingly and voluntarily elect to use these methods.'"²²³

The court emphasized that "our public policy of protecting victims of sexual discrimination and harassment through the provisions of Title VII and analogous state statutes" is "at least as strong as our public policy in favor of arbitration."²²⁴ It also noted that the remedies and procedures in arbitration are significantly different from those available in court, and that in a sexual harassment case these differences may be "particularly significant."²²⁵ The court concluded that because the plaintiffs in *Lai* did not even know that they had signed an arbitration agreement, their waiver was not knowing and voluntary.²²⁶ Moreover, the court stated that even if the appellants had been aware of the nature of the U-4 form, they could not have understood from the language of the agreement itself that they were agreeing to arbitrate sexual discrimination suits.²²⁷

The Supreme Court denied Prudential's motion for a writ of certiorari.²²⁸ Although this reaction is better for plaintiffs than a reversal of *Lai*, given Gilmer's failure to show that he voluntarily and knowingly waived his right to file his ADEA suit in court, there is still little protection for employees who are not subject to the most egregious of facts apparent in *Lai*. Since *Gilmer*, other industries besides securities have encouraged their members to require job applicants to sign arbitration agreements. For example, law firms, especially since the *Rena Weeks* case,²²⁹ have required that their associates sign

²²³ *Id.* (quoting 137 CONG. REC. S15478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole)).

²²⁴ *Lai*, 42 F.3d at 1305.

²²⁵ *Id.*

²²⁶ *See id.*

²²⁷ *See id.*

²²⁸ *Prudential Ins. Co. of Am. v. Lai*, 116 S. Ct. 61 (1995).

²²⁹ The largest ever individual sexual harassment award was given in *Weeks v. Baker & McKenzie*, 66 FEP Cases (BNA) 581 (Cal. Super. Ct. 1994). *See* Harriet Chiang, *Judge Halves \$7.1 Million Award in Harassment Case*, S.F. CHRON., Nov. 29, 1994, at A15. *Rena Weeks*, a secretary for the largest law firm in the world, Baker & McKenzie, alleged that her employer had tolerated her supervisor's repeated sexual advances to her and to other women in the firm. The jury held Baker & McKenzie liable to Ms. Weeks for \$50,000 in compensatory damages and \$6.9 million in punitive damages, as well as costs and attorneys fees exceeding \$1 million. The jury also awarded punitive damages of \$225,000 against Martin Greenstein, the alleged harasser. The trial judge denied the defendants' motion for a new trial and for judgment notwithstanding the verdict, reducing the punitive damages award against Baker & McKenzie to \$3.5 million. The trial judge affirmed that the conduct by the aggressor was abusive and that the firm's reaction was reprehensible. *See Weeks*, 66 FEP Cases. (BNA) at 582.

arbitration agreements waiving their rights to bring federal and state discrimination claims in court.²³⁰ Because of a contracting market for new lawyers, potential associates can hardly resist signing the agreements. To the extent that an industry exercises a cartel, conditioning employment on the execution of arbitration agreements, the industry, rather than the legislature, is making (or destroying) civil rights in employment law.

Employment lawyers differ on the question of whether predispute arbitration agreements²³¹ can ever be knowing and voluntary.²³² A potential plaintiff can never predict whether her future employer will violate her civil rights and, if it does, what damage such violations will do; therefore, she can not be assured that an arbitration panel will protect her rights. Moreover, job applicants sign most predispute agreements to arbitrate when they apply for a job or immediately after accepting a job offer. The applicant has no opportunity to consult an attorney concerning the arbitration clause. Unless the job applicant is extremely sophisticated about arbitration, she will most likely be unaware of the power of the arbitrators to ignore statutory law, of the limited discovery available in arbitration, and of the limited scope of review a court has over the arbitrator's decision. Of necessity, she will waive her rights, but she will not do so knowingly and voluntarily.²³³

Honoring only those agreements to arbitrate that the parties make after the dispute arises would protect employee rights because an employee entering a postdispute agreement to arbitrate has the opportunity to bargain over the particulars of her case, with the help of an attorney. The courts have not limited

²³⁰ See Richard B. Schmitt, *More Law Firms Seek Arbitration for Internal Disputes*, WALL ST. J., Sept. 26, 1994, at B18. Law firms have also experienced a significant increase in the number of discrimination complaints brought against them. See Richard C. Reuben, *Law Firm Bias Complaints Rising*, A.B.A. J., Dec. 1995, at 12; see also Mark Curriden, *Sign it, Alston & Bird Staff Told*, A.B.A. J., Aug. 1994, at 25 (discussing Atlanta firm requirement that partners and associates sign arbitration clause as a condition of employment; original draft contained a "white male provision," requiring that the arbitrator have at least 20 years' experience in a similarly sized law firm).

²³¹ A predispute agreement is one entered into before the dispute arises. A postdispute agreement to arbitrate is negotiated by the parties after the dispute arises.

²³² See Association of the Bar of the City of New York, Comm. on Labor and Employment Law, *Final Report on Model Rules for the Arbitration of Employment Disputes*, 50 THE RECORD 629, 629-32 (Oct. 1995) [hereinafter *Final Report*].

²³³ Since *Gilmer*, there have been a number of bills introduced in Congress to overturn the decision, but none have passed. See S. 366, 104th Cong., 1st Sess. (1995); H.R. 4981, 103d Cong., 2d Sess. (1994); S. 2405, 103d Cong., 2d Sess. (1994); *House Democrats Introduce Bill to Bar Compulsory Arbitration of Bias Claims*, 1994 Daily Lab. Rep. (BNA) No. 158, at D-4 (Aug. 18, 1994); *Senate Bill Bars Mandatory EEOC Arbitration*, 1994 Daily Lab. Rep. (BNA) No. 160, at D-20 (Aug. 22, 1994).

mandatory arbitration to postdispute agreements between employers and employees most likely because of the courts' desire to eliminate a large number of discrimination claims from court dockets. Voluntary programs that provide for postdispute arbitration have not been successful.²³⁴ We can attribute this lack of success, in part, to ignorance. A more likely cause, however, is that employees who have raised disputes with their employers are represented by counsel, and counsel have advised against arbitration because of the limited success plaintiffs have in arbitration of employment disputes.

Even though many plaintiffs' lawyers are uncomfortable with *Gilmer*, they recognize the severe import of the decision.²³⁵ Given the inevitability of arbitration as a means of dealing with employment disputes, plaintiffs' employment lawyers have joined with defense lawyers to propose standards for arbitration of employment disputes.²³⁶

²³⁴ For example, the New York State Division of Human Rights has had a voluntary program encouraging parties to arbitrate cases awaiting trial before the Division. Although this program has been in place for several years, in only two instances have parties opted for arbitration. See *Final Report*, *supra* note 232, at 637.

²³⁵ Ironically, although *Gilmer* is a bad decision for employment discrimination plaintiffs, since the federal courts have shown an increasing lack of interest in protecting civil rights litigants, the choice of a federal forum over an arbitral forum may not be such an advantage.

²³⁶ See *Final Report*, *supra* note 232. The Model Rules for the Arbitration of Employment Disputes ("The New York Model Rules"), authored by the Committee on Labor and Employment Law of the Association of the Bar of the City of New York, for example, apply to predispute arbitration agreements. The New York Model Rules grant to parties in arbitration many of the rights included in the Federal Rules of Civil Procedure. There are serious problems, however, with the New York Model Rules. The right to take only one deposition weighs heavily in favor of the defendant. This is true because in an individual case frequently the defendant needs to depose only the plaintiff, while there are a number of persons within the defendant's organization whom the plaintiff should depose because they have knowledge about the plaintiff's claim. See *Final Report*, *supra* note 232, at 641. The provision for selection of an arbitrator favors employers. See *id.* at 643, n.47. More importantly, the New York Model Rules extinguish a plaintiff's right to bring a wrongful discharge or any other action under state law based on the termination. See *id.* at 640, 649. This waiver would prevent an employee from bringing state law claims based on defamation, intentional infliction of emotional distress, and breach of contract, among others. See *id.* Plaintiffs gain very little from the New York Model Rules because plaintiffs were limited by the faults in the underlying civil rights law when they negotiated with the defense bar.

The New York Model Rules demonstrate the dangers of local compromise—although certain members of the committee drafting the rules believed that no predispute agreements to arbitrate should be enforced, the committee drafted the model rules to include positive reference to predispute arbitration agreements anyway. See *id.* at 630. Thus, the Committee has put its imprimatur on a system with which many employment lawyers would disagree.

The Dunlop Commission on the Future of Worker-Management Relations appointed by Secretary of Labor Robert B. Reich on behalf of President Clinton also endorses the use of voluntary arbitration to resolve disputes covered by public law.²³⁷ Although the Commission opposed the conditioning of a person's job on signing an arbitration agreement,²³⁸ it encouraged employers "to experiment broadly with voluntary programs so the nation can gain experience with this potentially valuable tool."²³⁹ Unfortunately, the Commission did not address seriously the question of what comprises a "voluntary" predispute arbitration agreement.²⁴⁰

4. *Causes of Judicial Backsliding in Discrimination Cases*

As we have seen, the convergence of *St. Mary's* and *Gilmer* with the courts' ever-increasing willingness to grant summary judgment in employment discrimination cases²⁴¹ represents a severe encroachment upon the civil rights of members of protected classes. While *Gilmer* prevents many plaintiffs from bringing their statutory cases to court, even if a discrimination plaintiff gets to federal court, *St. Mary's* makes it virtually impossible to prove a case of discrimination using circumstantial evidence.

There seem to be four major causes of the courts' curtailment of civil rights suits: (1) a more conservative federal judiciary appointed by Presidents Reagan and Bush;²⁴² (2) crowded court dockets resulting from the Speedy Trial Act²⁴³ and the litigation explosion;²⁴⁴ (3) the persistence of the employment at will doctrine bolstered by the law and economics movement;²⁴⁵ and (4) a backlash against special treatment for members of classes protected by employment discrimination statutes.²⁴⁶

²³⁷ See DUNLOP COMMISSION REPORT AND RECOMMENDATIONS, *supra* note 48.

²³⁸ See *id.* at 32.

²³⁹ *Id.* at 32-33.

²⁴⁰ The Commission set up standards, however, for an arbitration system that would fairly address employees' concerns. Such a system would include: (1) a neutral arbitrator; (2) a fair and simple method to bring a claim; (3) a fair method of cost-sharing between the employer and the employee; (4) an employee's right to independent representation; (5) remedies equal to those provided in litigation; (6) a written opinion; and (7) judicial review ensuring that the result is consistent with governing laws. See *id.* at 31.

²⁴¹ See generally McGinley, *supra* note 4.

²⁴² See discussion *infra*, Part II.C.4.a.

²⁴³ 18 U.S.C. § 3161 (1994).

²⁴⁴ See discussion *infra* Part II.C.4.b.

²⁴⁵ See discussion *infra* Part II.C.4.c.

²⁴⁶ See discussion *infra* Part II.C.4.d.

a. *Conservative Judiciary: Corporate Tastes*

In *Civil Rights in Employment: The New Generation*,²⁴⁷ Professor Linda Holdeman notes that the Supreme Court's civil rights decisions of 1989²⁴⁸ signaled a major policy shift from that reflected in the Court's early decisions interpreting Title VII.²⁴⁹ Initially after passage of the 1964 Act, the Court's decisions furthered the congressional intent of eradicating employment discrimination.²⁵⁰ The 1989 cases, which elevated the interests of advantaged groups over those of disadvantaged groups, demonstrated the Court's shift away from an aggressive policy to achieve racial and sexual equality. Professor Holdeman's explanation rings true not only for the Supreme Court. Lower courts have also become increasingly conservative when deciding discrimination claims.

With the election of Presidents Reagan and Bush and their appointment of more and more judges to the federal bench, the federal bench took a decided turn to the right.²⁵¹ Presidents Bush and Reagan openly considered candidates' politics before nominating them for the federal bench.²⁵² Approximately 90% of President Bush's judicial appointments were white; 85% were male.²⁵³ Even though President Clinton has filled more than 100 vacancies in the federal district and appellate courts with a large percentage of women and minorities who one would expect to reach liberal decisions in discrimination disputes, Clinton appointees still represent only 16.6% of federal district court judges and 10.8% of appellate judges who are in active service.²⁵⁴ Bush and Reagan appointees continue to dominate the judges in active service on the federal bench. As of January 1995, 60% of federal district court judges and more than 71% of federal appellate judges were Reagan or Bush appointees.²⁵⁵ Empirical

²⁴⁷ Linda Holdeman, *Civil Rights in Employment: The New Generation*, 67 DENV. U. L. REV. 1 (1990).

²⁴⁸ See, e.g., *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

²⁴⁹ See Holdeman, *supra* note 247, at 46-47 & nn.235-38.

²⁵⁰ See *id.* at 46 & nn.236-38.

²⁵¹ See Paul M. Barrett, *Federal Appeals Judge Embraces Liberalism in Conservative Times*, WALL ST. J., Mar. 15, 1996, at A1.

²⁵² See *id.* In contrast, President Clinton made it clear that his administration would not conduct ideological screenings of judicial candidates. See Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 JUDICATURE 276, 279 (1995). President Clinton sought to choose candidates on the basis of intellectual ability and judicial temperament. See *id.*

²⁵³ Goldman, *supra* note 252, at 281, 287.

²⁵⁴ See *id.* at 291.

²⁵⁵ See *id.*

studies show that in discrimination cases, federal judges appointed by President Reagan vote more conservatively than other Republican judges and much more conservatively than judges who are Democratic appointees.²⁵⁶ The large percentage of sitting federal judges appointed by Presidents Reagan and Bush, therefore, accounts, at least in part, for the bench's increased conservatism in deciding discrimination claims.²⁵⁷

b. *Crowded Dockets: Search for Efficiency*

The Judicial Conference of the United States has recently studied crowded dockets in federal courts.²⁵⁸ Its study describes a momentous increase in civil filings in federal district and appellate courts.²⁵⁹ This increase has proportionately exceeded the number of additional judges appointed to the bench.²⁶⁰ From 1940 until 1995, civil cases filed in the federal district courts increased from 34,734 to 239,013 annually.²⁶¹ From 1970 to 1995, district court filings, both civil and criminal, increased from 317 to 436 per year per judge.²⁶² Not only do the federal judges have more cases to decide, but those cases have also increased in complexity.²⁶³

Although the criminal caseload of federal judges has fluctuated significantly over the past twenty years and criminal filings are down slightly, a look at the number of criminal filings alone does not accurately demonstrate the

²⁵⁶ See Timothy Tomasi & Jess Velona, Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766, 783 (1987) (concluding that although in most areas of the law Reagan appointees did not vote much more conservatively than other Republican judges on the bench, one obvious exception was the discrimination cases). This study found that in nonunanimous appellate decisions in discrimination cases, Reagan appointees took the liberal side of the case 24% of the time while other Republican appointees took the liberal position 39% of the time and Democratic appointees took the liberal position 69% of the time. See *id.*

²⁵⁷ President Clinton, during the first half of his first term, nominated a large percentage of "nontraditional" candidates to the bench, most of whom were confirmed by Congress. See generally Goldman, *supra* note 252. By "nontraditional" the author refers to persons of color and women. See *id.* at 280.

²⁵⁸ JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS (1995) [hereinafter JUDICIAL CONFERENCE].

²⁵⁹ See *id.* at 10-11.

²⁶⁰ See *id.*

²⁶¹ See *id.* at 15. These filings are projected to increase to 976,500 in the year 2020. See *id.*

²⁶² See *id.* at 10.

²⁶³ See *id.*

contribution of criminal cases to the crowded federal court dockets.²⁶⁴ Criminal cases filed in federal court are more complex than in the past and they represent an increasingly large percentage of the federal district courts' trial calendar.²⁶⁵ The Speedy Trial Act,²⁶⁶ which requires that criminal cases come to trial expeditiously, effectively gives trial priority to criminal cases.²⁶⁷ The imposition of mandatory minimum sentencing and the new federal sentencing guidelines have encouraged more criminal defendants to go to trial and to refuse to plea bargain.²⁶⁸ In some judicial districts the large percentage of criminal trials has produced significant delays in civil suits.²⁶⁹ Although no data exists yet, the 1994 Crime Act which provided for expanded federal penalties for violent crimes²⁷⁰ will likely move civil cases even further down the list of cases awaiting trial.²⁷¹

Besides the congestion caused by the criminal cases and the general increase in civil filings, federal courts have experienced a tremendous growth in the number of employment discrimination cases filed in the past twenty years. Between fiscal years 1970 and 1989, there was an increase of 2166% in employment discrimination cases, as compared with an increase of 125% during the same time period for the general civil caseload.²⁷² This increase has

²⁶⁴ See *id.* at 10-11.

²⁶⁵ See *id.* at 10-12. For example, the number of multiple defendant cases has grown by 47% since 1980. See *id.* at 12. In 1972, criminal cases represented one-third of the total filings in federal court and 40% of the trials. See *id.* In 1994, even though the criminal filings were only 13% of the filings, the criminal cases accounted for 42% of the trials. See *id.*

²⁶⁶ 18 U.S.C. § 3161 (1994).

²⁶⁷ Criminal cases must be tried within 70 days of the defendant's original appearance. See *id.* Because judges are assigned new criminal cases each month, they must process criminal cases constantly and steadily. See Diana E. Murphy, *The Concerns of Federal Judges*, 74 JUDICATURE 112, 114 n.3 (1990).

²⁶⁸ Murphy, *supra* note 267, at 114 n.1.

²⁶⁹ JUDICIAL CONFERENCE, *supra* note 258, at 11; see also Victor Williams, *Solutions to Federal Judicial Gridlock*, 76 JUDICATURE 185, 185 (1993); Garry Sturgess, *Another Clash over Criminal Caseload*, LEGAL TIMES, Apr. 1, 1991, at 7 (quoting Chief Judge Aubrey Robinson, Jr.: "With the imposition of the Speedy Trial Act, sentencing guidelines, mandatory minimum sentencing, and the series of anti-drug and anti-crime laws enacted since 1984, something has had to give. Of necessity, it has been the civil-justice system that has suffered most.").

²⁷⁰ Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

²⁷¹ See DUNLOP COMMISSION REPORT AND RECOMMENDATIONS, *supra* note 48, at 26 n.1.

²⁷² See Donohue & Siegelman, *supra* note 14, at 985. The authors posit that the increase is due to a variety of factors: primarily, increased unemployment; an increase in the labor force of members of the protected classes; the increase of younger, more sophisticated women

placed considerable pressure on the federal courts to dispose of these cases in more efficient ways, a pressure that has led, in part, to the courts' increased use, and I have argued, misuse, of summary judgment in these cases,²⁷³ movement away from the *McDonnell Douglas* approach,²⁷⁴ and a movement toward the approval of the use of mandatory arbitration in employment discrimination cases.²⁷⁵

Although docket pressure alone probably does not account for the shift in treatment of employment discrimination cases, the docket pressures coincided temporally with the appointment of a more conservative judiciary²⁷⁶ and fewer claims of overt discrimination.²⁷⁷ This collision has seriously undermined the rights of plaintiffs discharged due to illegal discrimination.

c. *Employment at Will: Law and Economics*

As illustrated above by *St. Mary's*²⁷⁸ and *Visser*,²⁷⁹ judges' use of the employment at will doctrine severely limits the protection of the employment discrimination statutes. Even though courts have created limited exceptions to the at-will doctrine, they have persistently upheld the doctrine of employment at will.

The emergence of the law and economics movement has provided theoretical support for the derogation of the antidiscrimination statutes and the retention of the employment at will doctrine. Advocates for the movement argue that employers act to maximize profits.²⁸⁰ Rational employers, therefore, would never fail to hire or discharge an employee for anything but good cause.²⁸¹ Besides the obvious economic disadvantage of firing a productive worker, economists contend that employers in a competitive market who discharge workers for irrational reasons cannot compete with other firms for workers. Thus, they argue, employers will act rationally and discharge only for

and minorities in the workforce; the passage of new statutory provisions; and the increase in the integrated work force. *See id.* at 988-1015. Doctrinal changes created by judicial opinions such as the disparate impact cause of action produced a minimal increase. *See id.*

²⁷³ *See* McGinley, *supra* note 4.

²⁷⁴ *See* discussion of *St. Mary's*, *supra* Part II.C.2.

²⁷⁵ *See* discussion of *Gilmer*, *supra* Part II.C.3.

²⁷⁶ *See supra* Part II.C.4.a.

²⁷⁷ *See supra* Part II.A.

²⁷⁸ *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

²⁷⁹ *Visser v. Packer*, 924 F.2d 655 (7th Cir. 1991) (en banc).

²⁸⁰ Although this may be an accurate assumption, it is not adequate to explain all motivations for employers' actions.

²⁸¹ *See generally* GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (1971).

just cause and there is no need for a just cause requirement.²⁸²

In the hiring context, Professor Gary Becker has noted that persons who decide that they do not want to trade with others due to their race, sex, or age are making a decision that will limit their own opportunities for advancement and success.²⁸³ The more irrational the preferences and the greater the pool of persons who are considered off-limits, the greater the harm to employers who decide to exclude them and the greater advantages to the competitors.²⁸⁴ Thus, Becker concludes that a competitive market will drive out all forms of discrimination because discrimination is irrational for employers to pursue.²⁸⁵

Although he differs with the conclusion that all employment discrimination is irrational and will thus be driven from the market in the absence of regulation, Professor Richard Epstein in his recent book, *Forbidden Grounds*,²⁸⁶ argues for the elimination of the antidiscrimination statutes. Epstein argues that some discrimination is rational because it can lead to more efficient workplaces. Epstein opposes regulation of private industries because a group that can minimize its differences in tastes will be more efficient in some cases. To the extent that tastes diverge, it may be more difficult to achieve a common goal. Harmony of tastes and preferences, according to Epstein, will work in the long term interest of all members of the group.²⁸⁷

Other commentators and scholars have demonstrated convincingly that discrimination is rational.²⁸⁸ For example, as Richard H. McAdams has noted, a group that identifies with persons of like kind will cooperate to the economic detriment of another group for the purpose of raising the group's status.²⁸⁹ This cooperation breeds conflict with other groups, emphasizing racial differences and supporting greater exclusivity and greater success of the dominant groups.²⁹⁰

²⁸² See Note, *Employer Opportunism and the Need for a Just Cause Standard*, 103 HARV. L. REV. 510, 511 (1989).

²⁸³ See BECKER, *supra* note 281, at 39-54.

²⁸⁴ See *id.*

²⁸⁵ See generally BECKER, *supra* note 281.

²⁸⁶ RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

²⁸⁷ See *id.* at 61-69.

²⁸⁸ See *id.* (concluding that employers who hold bonuses for employees to prevent shirking in the early years of employment make a rational decision to discharge productive employees as they age in order to avoid paying the bonuses or pension benefits).

²⁸⁹ See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003 (1995).

²⁹⁰ See *id.* But see Leroy D. Clark, *The Law and Economics of Racial Discrimination in Employment*, 79 GEO. L.J. 1695 (1991) (reviewing David A. Strauss, *The Law and Economics of Racial Discrimination in Employment*, 79 GEO. L.J. 1619 (1991)) (arguing that

Although economics provides a valuable tool in analyzing legal issues, it is often based on questionable assumptions about the availability of information and human behavior. For example, the conclusion that an employer cannot attract workers because workers will have information about the employer's opportunistic discharge practices assumes that prospective employees have access to information about the employer's discharge practices that they may not have, either because they are afraid to ask, or because the firm projects an inaccurate picture of job security.²⁹¹

Moreover, personal biases can cloud the lens through which a supervisor will evaluate an employee. Whether these biases are conscious or subconscious, race-based decisions occur. For example, employees tend to be more comfortable with persons like themselves and seek to surround themselves with them. This tendency can create a situation where the evaluator misjudges the subordinate's work without an intent to do so. Thus, his evaluation can be irrational even though he does not believe or intend it to be.

Furthermore, economic theory assumes that the person whose goal is to maximize profits is the same person who makes the decision to discharge an employee. This assumption is not entirely accurate. Often the decision is made by a lower level supervisor whose salary does not depend on making a rational decision. If the decision is made by a manager who has responsibility for maximizing profits, often he or she must rely on the first-hand impressions of lower level supervisors, who may have evaluated the employee through a biased lens.

A complete review of economics literature is beyond the scope of this Article, and I do not mean to distort the theories of Becker, Epstein, and others who use economics to discuss antidiscrimination law. My point is to demonstrate how pervasively economic theory has penetrated the law. Epstein's views, in particular, have received an enormous amount of attention.²⁹² Epstein

discrimination is irrational and that more, rather than fewer, disparate treatment cases would help the cause of racial nondiscrimination).

²⁹¹ See Note, *supra* note 282, at 524.

²⁹² See, e.g., Mary E. Becker, *Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment*, 79 GEO. L.J. 1659 (1991); John J. Donohue, III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583 (1992) (reviewing RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992)); Title VII Symposium: *A Critique of Epstein's Forbidden Grounds*, 31 SAN DIEGO L. REV. 1 (1994) (including articles by W.B. Allen, Ian Ayres, David E. Bernstein, Lea Brilmayer, Robert Cooter, Drew S. Days, III, Andrew Kull, Evan Tsen Lee, Jerry L. Mashaw, Richard H. McAdams, J. Mark Ramseyer, and Christopher T. Wonnell); J. Hoult Verkerke, *Free to Search*, 105 HARV. L. REV. 2080 (1992) (reviewing EPSTEIN, *supra*). These are only a few of the many law review articles addressing Epstein's views.

has moved the discussion decidedly to the right. Rather than debate whether the law should be distributive or corrective, for example, the discourse concerns whether antidiscrimination law should exist at all. These economic theories have affected judges' attitudes toward antidiscrimination law, leading to a more conservative interpretation of antidiscrimination law.²⁹³

d. *Backlash: White Male Resistance*

The increased use of the employment discrimination statutes to sue employers has created a backlash by members of unprotected classes against the giving of "special treatment" to members of classes protected by the civil rights statutes.²⁹⁴ There are two reasons for this backlash. First, the 1964 Act was passed in an era of great economic growth.²⁹⁵ As the economy shrinks, and jobs become more competitive, it is more difficult to be magnanimous.

In an expanding economy, there are more job opportunities for members of the protected classes, jobs that they will not take away from their unprotected counterparts. Rather than taking a piece of the pie intended for a white male worker, blacks and women in an expanding economy can share in the pie because the pie is much larger.²⁹⁶ Theoretically, with a larger pie, there is no need for redistribution.²⁹⁷ Thus, the 1964 Act could be corrective in nature without Congress's having to make the hard choices concerning

²⁹³ An example of a sitting judge who unabashedly applies law and economics theory to the cases he decides is Judge Richard Posner of the Seventh Circuit. *See generally* McGinley & Stempel, *supra* note 87.

²⁹⁴ Gilbert Casellas, Chair of the EEOC, believes that the most formidable barrier currently facing the EEOC is the backlash caused by the debate on affirmative action, even though the EEOC is not an affirmative action agency. *See EEOC Adopts Charge-Priority System*, *supra* note 39, at 15.

²⁹⁵ *See* H.R. REP. NO. 88-914 (1963), *reprinted in* LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, *supra* note 125, at 2001, 2151, *also reprinted in* 1964 U.S.C.C.A.N. 2355, 2516.

²⁹⁶ An interesting corollary is that when the economy shrinks, plaintiffs bring more employment discrimination suits. Donohue and Siegelman have concluded that the "single most important factor explaining the growth in the employment discrimination caseload over the period from FY 1970-1989 is the increase in the unemployment rate." *See* Donohue & Siegelman, *supra* note 14, at 990.

²⁹⁷ Studies of the results of affirmative action in government contracts show that women workers fared less well as a result of affirmative action than their black counterparts. *See generally* Jonathan S. Leonard, *Woman and Affirmative Action*, 3 J. ECON. PERSP. 61 (1989). There has occurred, however, a massive shift in the gender composition of the workforce between 1960 and 1980, which may be due to a combination of a "massive shift in female labor supply" and the threat of litigation under Title VII. *Id.* at 64.

redistribution.²⁹⁸ The legislative history supports this view. Proponents of Title VII repeatedly justified the 1964 Act in terms of economics and international competition. The House Judiciary Committee Report projected that employment needs in "practically every professional and technical field are expected to rise substantially," and "requirements for managers, clerical workers, sales workers, craftsmen, foremen, and similar skilled occupational groups are all projected for large increases."²⁹⁹ According to the House Committee on Education and Labor Report, discrimination was an ineffective use of our manpower resources,³⁰⁰ which eventually would lead to an inability to compete with the Soviet Union and Red China and to maintain the country's economic superiority.³⁰¹

Second, the number of protected classes has increased greatly. Title VII protects persons from being fired on account of their race, color, sex, religion, or national origin.³⁰² The ADEA protects persons from being fired because of their age.³⁰³ The ADA protects persons from being fired because of their disabilities.³⁰⁴ Courts have interpreted "disabilities" broadly to include drug and alcohol addiction and mental and emotional problems.³⁰⁵ This is a fairly comprehensive list, which has led young white males to feel that they have been singled out for unfair treatment.³⁰⁶ This feeling has created a backlash against the protections of federal and state antidiscrimination statutes, influencing federal judges to limit the protections of antidiscrimination statutes. This backlash is partially responsible for both the curtailment of federal statutory civil rights and the growth of state common law exceptions to the employment at will doctrine discussed in Part III below.

²⁹⁸ One study has found that federal contractors, when asked to describe their goals, claim that they will accommodate more women and minorities "by increasing the size of the total employment pie," rather than by replacing white men with women and minorities. Leonard, *supra* note 297, at 71. This study appears to demonstrate the lack of acceptance of a redistributive goal of antidiscrimination law.

²⁹⁹ H.R. REP. NO. 88-914, *supra* note 295, at 2151.

³⁰⁰ See H.R. REP. NO. 87-1370 (1962), *reprinted in* LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, *supra* note 125, at 2155, 2157.

³⁰¹ See *id.*

³⁰² 42 U.S.C. § 2000a (1994).

³⁰³ 29 U.S.C. § 623(a) (1994).

³⁰⁴ 42 U.S.C. § 12101 (1994).

³⁰⁵ See, e.g., *Torcasio v. Murray*, 57 F.3d 1040, 1054 (4th Cir. 1995) (citing 28 C.F.R. 35.104), *cert. denied*, 116 S. Ct. 772 (1996).

³⁰⁶ See, e.g., Paul Craig Roberts, *The Rise of the New Inequality*, WALL ST. J., Dec. 6, 1995, at A20. ("Over the past two decades we have inadvertently created a caste society in which there are two classes of citizens: those who are protected by civil rights laws and white males, who are not.").

III. THE ERODED BUT PERSISTENT EMPLOYMENT AT WILL DOCTRINE

A. Common Law Exceptions

At the same time that federal courts cut back on employees' civil rights, state courts have expanded the rights of at-will employees through state common law. Although the employment at will doctrine was once an impenetrable sheath, courts have pierced it with many holes.³⁰⁷ Public policy exceptions,³⁰⁸ breach of an implied in fact contract,³⁰⁹ implied covenants of good faith and fair dealing,³¹⁰ the increased use of the law of defamation in the workplace,³¹¹ and the creation of contractual rights in employment manuals³¹² are some of the theories the courts have used to avoid unfair application of the employment at will doctrine.³¹³ By the early 1990s employees filed approximately 10,000 wrongful discharge suits annually in state courts.³¹⁴

It is no accident that the number of exceptions to the employment at will

³⁰⁷ For an excellent description of the history of the common law exceptions to the employment at will doctrine, see Peck, *supra* note 13.

³⁰⁸ Professor Peck has noted that there are five categories of cases protecting employees from firings violating public policy: "(1) discharges for refusing to violate criminal or civil laws; (2) discharges for having performed civic duties or statutory obligations; (3) discharges for asserting statutory or constitutional rights or privileges; (4) discharges for socially desirable performances not required by law; and (5) discharges for what are recognized as socially reprehensible reasons." Peck, *supra* note 13, at 744.

³⁰⁹ See *Foley v. Interactive Data Corp.*, 765 P.2d 373, 383 (Cal. 1988) (holding that the plaintiff had alleged a cause of action for the breach of an implied in fact contract created by the employer's course of conduct).

³¹⁰ See, e.g., *id.*, at 765 P.2d 389-402 (recognizing a cause of action for breach of implied covenant of good faith and fair dealing, but limiting recovery to contract damages).

³¹¹ See, e.g., *Hanson v. New Tech., Inc.*, 594 So. 2d 96 (Ala. 1992); Donald Seifman & Craig W. Trepanier, *Evolution of the Paperless Office: Legal Issues Arising Out of Technology in the Workplace*, 21 EMP. REL. L.J., Winter 1995, at 5; *Ex-Snet Employee Awarded \$580,000*, HARTFORD COURANT, Dec. 15, 1995, at A41; Jan Crawford Greenburg, *Reference Ill Will Spurs Worker Suits*, CHI. TRIB., Nov. 30, 1995, at N1; Jonathan Marshall, *Employers May Find Safety in Silence*, S.F. CHRON., Dec. 29, 1995, at C1; Kerri Smith, *Fired? What Do You Say when Interviewing for Another Job?*, ARIZ. REPUBLIC, Aug. 7, 1995, at E4.

³¹² See, e.g., *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1264, *modified*, 499 A.2d 515 (N.J. 1985) (holding that an employment manual can bind the employer contractually to its provisions).

³¹³ The vast majority of courts recognize some exceptions to the employment at will doctrine. Only a handful of states do not recognize exceptions. See *Employment at Will: State Rulings Chart*, 9A Lab. Rel. Rep. (BNA) 505:51-52 (Aug. 27, 1996).

³¹⁴ See DUNLOP COMMISSION FACT FINDING REPORT, *supra* note 47, at 112-13.

doctrine took a giant leap after the passage of the 1964 Act. Although in 1959, a court of appeals of California had decided *Petermann v. International Brotherhood of Teamsters, Local 396*,³¹⁵ holding that a discharge of a union business representative for refusing to commit perjury at a state legislative committee hearing was unlawful, it was not until the mid-1970s when judges, expanding on *Petermann*, began to recognize varying exceptions to the employment at will doctrine.³¹⁶ The judicial creation of common law exceptions was fueled by a number of law review articles, all written after the passage of the 1964 Act,³¹⁷ arguing that either the courts or the state legislature should amend the employment at will doctrine.³¹⁸

Professor Peck notes that during the 1970s, when the exceptions to the employment at will doctrine were emerging, between thirty-five and forty percent of the nonagricultural work force was protected from discharge without cause.³¹⁹ Although employers did not need just cause to fire members of protected classes under federal and state employment discrimination statutes, the civil rights acts imposed additional limitations, on the employer's power to discharge as he wished, broadening the class of workers protected.

This broad protection, whether perceived or real, had an effect on both unprotected workers and on judges deciding employment cases. It gave employees at will false expectations concerning their own rights in the workplace.³²⁰ Moreover, judges, who were accustomed to enforcing

³¹⁵ 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

³¹⁶ See Peck, *supra* note 13, at 724.

³¹⁷ See Blades, *supra* note 8; Peck, *supra* note 8; Summers, *supra* note 9.

³¹⁸ The presence of the federal employment discrimination laws was not the only cause for the exceptions to the employment at will doctrine. A RAND Corporation study found that there was a strong positive correlation between the extent of unionization in a state and its willingness to adopt exceptions to the employment at will doctrine. See JAMES N. DERTOUZOS ET AL., THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION 14, 49-50 (1988). Although correlation does not prove causation, this study suggests that the presence of many workers with rights limiting the employer's freedom to discharge may affect the judiciary's view toward the employment at will doctrine in the non-unionized context. It appears that the state judiciary reacted to the antidiscrimination laws in the same way. See Peck, *supra* note 8, at 3-4, 44-46.

³¹⁹ Professor Peck estimates this figure by combining the 28% of the nonagricultural work force that was employed pursuant to a collective bargaining agreement, 95% of whom were protected by just cause provisions in the collective bargaining agreement, with the large number of federal and state employees who had protection from discharge without cause. See Peck, *supra* note 13, at 729-30.

³²⁰ This perception may not have resulted solely from the existence of the 1964 Act. It may have preceded the 1964 Act's passage. See Alfred W. Blumrosen, *United States Report*, 18 RUTGERS L. REV. 428, 432-33 (1964) (explaining that [before 1964] employers and employees had changed expectations regardless of whether there was a collective bargaining

employees' statutory claims by awarding back pay under the discrimination statutes, sought to remedy employer unfairness when faced with lawsuits that did not constitute statutory violations.³²¹

More recently, once informed of their lack of rights vis-à-vis their protected coworkers, young white male at-will employees have fought back.³²² This backlash seems to have influenced the state courts to create exceptions to the employment at will doctrine in order to level the playing field.

I do not imply that the employment at will doctrine is dead. In fact, it thrives.³²³ Although it seems that there are many exceptions to the doctrine, those exceptions are limited, however, and vary from state to state.³²⁴

agreement: "[B]oth . . . now expect fair treatment and fair dealing, proof before discipline, and uniform enforcement of reasonable rules of conduct and discipline."). At the time Blumrosen wrote this article, there was no federal antidiscrimination act and only twenty of the fifty states prohibited discrimination in hiring, promotion, and discipline based on race, creed, color, or national origin. *See id.* at 429.

For empirical data on the expectations of employees and employers, see Frank S. Forbes & Ida M. Jones, *A Comparative-Attitudinal, and Analytical Study of Dismissal of At-Will Employees Without Cause*, 37 LAB. L.J. 157, 165-66 (1986). Forbes and Jones conducted a random telephone survey of Omaha, Nebraska residents. They learned that only 15% to 22% of respondents knew that employers had the right to terminate employees at any time without cause. The vast majority of respondents believed that it was unethical for employers to fire employees without cause. Most of the respondents would agree with a law that would force employers to demonstrate it had cause before firing employees. *See id.*

³²¹ See Kenneth G. Dau-Schmidt, *Meeting the Demands of Workers into the Twenty-First Century: The Future of Labor and Employment Law*, 68 IND. L.J. 685, 700 (1993).

³²² See, e.g., Jeremy Iggers, *January Roundtables to Feature Divisive Topic of Race Relations*, STAR TRIB. (Minneapolis), Dec. 21, 1992, at 3E; Catherine S. Manegold, *Fewer Men Earn Doctorates, Particularly Among Blacks*, N.Y. TIMES, Jan. 18, 1994, at A14; Clarence Page, *Backlash: Affirmative Action: What You Don't Hear*, PHOENIX GAZETTE, Mar. 4, 1993, at A15; Judy Pasternak, *Service Still Skin-Deep for Blacks*, L.A. TIMES, Apr. 1, 1993, at A1; Richard J. Trzupek, *Don't Confuse Opportunity with Results*, CHI. TRIB., Mar. 30, 1993, at N12.

³²³ For an egregious example of the victory of the employment at will doctrine over sanity, see *Bigelow v. Bullard*, 901 P.2d 630 (Nev. 1995). In *Bigelow*, the court dismissed the case for failure to state a cause of action. The complaint alleged a violation of Nevada public policy when an employer fired a white employee for supporting the rights of blacks in the workplace. The complaint alleged that the employer had reprimanded the plaintiff for being a "fucking nigger lover" and that the plaintiff had been dismissed because he told a coworker that, "blacks have rights too." *Id.* at 632-33. According to the Nevada Supreme Court, even if these allegations are true, the firing would not violate Nevada public policy because the employer did not dismiss the employee for a refusal to carry out employment tasks that were contrary to public policy or for performing acts that were endorsed by public policy. *See id.* at 635.

³²⁴ Despite the public perception fueled by the media that employees get very high

Consider the public policy exception.³²⁵ The underlying theoretical basis for the public policy exception is that the employee's dismissal violates the state's public policy. The scope of the exception, therefore, depends on the courts' interpretation of the term "public policy." Conceivably public policy could include a policy to keep as close to full employment as possible. If this broad definition applied, one could argue that in light of employees' reliance on their jobs for income, health care, and pension benefits, and because of the state's interest in keeping unemployment low, it is against public policy to fire an employee without just cause.³²⁶

No court has defined public policy so broadly. In fact, many of the states recognizing the public policy exception have defined public policy very narrowly. According to these courts, public policy is embodied only in legislative enactments.³²⁷ An employer does not violate public policy by firing an employee unless he demands that the employee violate the law in order to keep his job.³²⁸

Another exception is the implied covenant of good faith and fair dealing. The majority of courts have refused to recognize the implied covenant of good faith and fair dealing in employment contracts.³²⁹ But even those recognizing an implied covenant of good faith and fair dealing have interpreted it very conservatively. As Professor Peck has demonstrated, the implied covenant could theoretically require an employer to have "good cause" for terminating an employee. However, the great majority of courts adopting the implied

awards for wrongful discharge, a RAND Corporation study demonstrates that even in California, a state known for its liberal approach to wrongful discharge law, the average amount of damages collected by plaintiffs alleging wrongful discharge, after post trial reductions, attorney's fees, and costs, was only \$30,000. After discounting this sum for lost interest, the study concluded that the typical plaintiff receives approximately the equivalent of one-half year's severance pay. See DERTOUZOS ET AL., *supra* note 318, at 39. This amount is significantly lower for women and persons over 50 years old. See *id.* at vii. These figures take into account both winning and losing plaintiffs in jury trials where plaintiffs were successful in approximately 68% of the cases. See *id.*

³²⁵ For a description of the public policy exception to the employment at will doctrine, see Christopher L. Pennington, *The Public Policy Exception to the Employment-At-Will Doctrine: Its Inconsistencies in Application*, 68 TUL. L. REV. 1583 (1994).

³²⁶ When I discuss "discharge" or "firings" here, I am not including layoffs necessary to the financial stability of the business.

³²⁷ See, e.g., *Crockett v. Mid-American Health Servs.*, 780 S.W.2d 656, 658 (Mo. Ct. App. 1989) (stating that an employer violates public policy if it discharges an employee for his refusal to violate the law).

³²⁸ See *Bigelow v. Bullard*, 901 P.2d 630 (Nev. 1995).

³²⁹ See Peck, *supra* note 13, at 739 (relying on *Employment at Will: State Rulings Chart*, 9A Lab. Rel. Rep. (BNA) 505: 51-52 (Aug. 27, 1996)).

covenant as an exception to the employment at will doctrine have not found a good cause requirement.³³⁰ Montana and Idaho appear to be the only states that have read a just cause requirement into the implied covenant of good faith and fair dealing.³³¹ Most courts that imply a covenant of good faith and fair dealing require only a showing of subjective good faith belief on the employer's part that the discharge was the appropriate discipline for the employee's infraction.³³² As Professor Peck demonstrates, this standard tolerates errors of supervision to the employee's detriment.³³³ Moreover, the measure of damages in these breaches is crucial. In California, which recognizes the implied covenant, the courts limit recovery to contract damages,³³⁴ even though the covenant is implied by law, not by the contract itself, and, according to Professor Peck, tort damages are more appropriate.³³⁵

A final example of the weak protections afforded by the common law exceptions to the employment at will doctrine is the employee handbook exception. According to this exception, an employee manual or handbook creates an enforceable contract to dismiss an employee only for just cause or to use the procedures outlined in the manual.³³⁶ This theory is extremely limited, even dangerous to employee rights. Because its theoretical underpinning is that the manual language creates a contract, courts have held that the employer can escape liability by making an obvious disclaimer in the employment manual,³³⁷ by unilaterally changing the handbook,³³⁸ or by merely employing the procedures for discharge outlined in the handbook.³³⁹

Even worse, some courts have permitted employers to enforce arbitration clauses appearing in employee manuals even though the employees have not voluntarily and knowingly waived their rights to bring their statutory cases to

³³⁰ See *id.* at 739-40.

³³¹ *Metcalf v. Intermountain Gas*, 778 P.2d 745 (Idaho 1989); *Dare v. Montana Petroleum Mktg.*, 687 P.2d 1015 (Mont. 1984); *Gates v. Life of Mont. Ins. Co.*, 668 P.2d 713 (Mont. 1983) (*Gates II*); *Gates v. Life of Mont. Ins. Co.*, 638 P.2d 1063 (Mont. 1982) (*Gates I*).

³³² See Peck, *supra* note 13, at 740 and cases cited therein.

³³³ See *id.*

³³⁴ See *Foley v. Interactive Data Corp.*, 765 P.2d 373, 389-402 (Cal. 1988).

³³⁵ See Peck, *supra* note 13, at 742-43.

³³⁶ See, e.g., *Woolley v. Hoffman-La Roche*, 491 A.2d 1257, *modified*, 499 A.2d 515 (N.J. 1985).

³³⁷ See, e.g., *Smith v. Union Labor Life Ins. Co.*, 620 A.2d 265 (D.C. App. 1993); *Hanson v. New Tech., Inc.*, 594 So. 2d 96 (Ala. 1992); *Arnold v. Diet Ctr., Inc.*, 746 P.2d 1040 (Idaho Ct. App. 1987).

³³⁸ See *Hoffman-La Roche, Inc., v. Campbell*, 512 So. 2d 725, 735 (Ala. 1987) (citing HENRY H. PERRITT, JR., *EMPLOYEE DISMISSAL LAW AND PRACTICE* 150 (1984)).

³³⁹ See *MacNeil v. Minikoda Mem'l Hosp.*, 701 P.2d 208, 209 (Idaho 1985).

court.³⁴⁰ This use of the handbook by the employer as a sword rather than by an employee as a shield can be hazardous to the employee's rights in the workplace.

Ironically, although these exceptions to the employment at will doctrine grant only limited job security to workers, their existence, together with the broad coverage of the antidiscrimination acts, has heightened employees' expectations that the law will protect their interest in fair treatment on the job.³⁴¹ Unfortunately, these heightened expectations have no basis in reality for the average worker. In fact, heightened expectations in job security can be destructive to workers. Employers unfairly benefit by the employment at will doctrine if the employees enter work believing that they have rights they do not actually possess.

Professor Theodore J. St. Antoine, the reporter for the Drafting Committee on the Uniform Employment Termination Act³⁴² of the National Conference of Commissioners on Uniform State Laws, estimates that there are between 150,000 and 200,000 persons dismissed annually without just cause.³⁴³ St. Antoine describes the "devastating financial impact" of lost income and the "increases in cardiovascular deaths, suicides, mental breakdowns, alcoholism, ulcers, spouse and child abuse, and impaired social relationships that follow in the wake of job loss."³⁴⁴ Furthermore, employees who lose their jobs may also lose health insurance for themselves and their families.³⁴⁵ "[O]ne of the most important determinants of health insurance coverage" is employment.³⁴⁶ Given the devastating effects of job loss, national public policy should protect at least those workers who innocently lose their jobs.

Although economists argue that the employment at will doctrine is fair to employers and employees because it imposes mutual obligations on employers

³⁴⁰ See, e.g., *Lang v. Burlington No. R.R.*, 835 F. Supp. 1104, 1106 (D. Minn. 1993) (holding state law wrongful discharge claim arbitrable under arbitration provision of employee handbook); *Corion Corp. v. Gih-Horing Chen*, 124 Lab. Cas. (CCH) ¶ 57,220 (D. Mass. 1991); *Fregara v. Jet Aviation Bus. Jets*, 764 F. Supp. 940 (D.N.J. 1991).

³⁴¹ See *Forbes & Jones*, *supra* note 320, at 165-66.

³⁴² MODEL UNIFORM EMPLOYMENT TERMINATION ACT (1991), *reprinted in* 9A Lab. Rel. Rep. (BNA) 540:21 (Aug. 8, 1991).

³⁴³ See Theodore J. St. Antoine, *The Model Employment Termination Act: A Threat to Management or a Long-Overdue Employee Right?*, in PROCEEDINGS OF NEW YORK UNIVERSITY 45TH ANNUAL NATIONAL CONFERENCE ON LABOR 269, 270 (Bruno Stein ed., 1993); MODEL UNIFORM EMPLOYMENT TERMINATION ACT, *supra* note 342, at 540:21, :23.

³⁴⁴ St. Antoine, *supra* note 343, at 270.

³⁴⁵ See *Health Coverage: Number of Uninsured Persons Increased to 36.6 Million in 1991*, 20 Pens. Rep. (BNA) 114 (Jan. 18, 1993).

³⁴⁶ See *id.* at 114.

and employees,³⁴⁷ St. Antoine argues convincingly that contract law no longer requires mutuality of obligation, but consideration.³⁴⁸ An employee's rendition of services provides consideration for the contract.³⁴⁹

Moreover, market theory does not reflect the reality of the contracting process for the average employee. In a recent article, Professor J. Hoult Verkerke erroneously concludes that courts should reaffirm the employment at will doctrine as a default rule.³⁵⁰ Verkerke conducted empirical research of 221 employers in five states to determine the types of contracts existing between employers and employees.³⁵¹ His data shows that 52% of employers contract explicitly for employment at will, 33% have no contractual documents governing the relationship, and 15% contract explicitly for just cause protection.³⁵² The data demonstrates that the state's wrongful discharge law had little or no effect on whether employers contracted with their employees for just cause protection.³⁵³ There is, however, a significant positive correlation between a liberal jurisdiction's wrongful discharge law and the percent of employers who contract explicitly for employment at will.³⁵⁴ Noting that the purpose of a default rule is to predict how the parties would have arranged their contractual relationship had they chosen to do so, Verkerke concludes from the data that because most employers either contract explicitly for employment at will or rely on the employment at will default rule, the employment at will doctrine is the proper default rule.³⁵⁵

Although Verkerke attempts to answer in his article most of the arguments in favor of a just cause requirement, neither his economic theory nor his empirical data satisfactorily accounts for the bargaining process between the average prospective employer and employee. Verkerke responds to arguments in favor of just cause provisions in piecemeal fashion, ignoring the synergistic effect of numerous factors that uphold domination of the employer's will when

³⁴⁷ See, e.g., Richard A. Epstein, *In Defense of the Contract at Will*, in *LABOR LAW AND THE EMPLOYMENT MARKET* 3, 9-11 (Richard A. Epstein & Jeffrey Paul eds., 1985).

³⁴⁸ See St. Antoine, *supra* note 343, at 271.

³⁴⁹ See *id.*

³⁵⁰ See J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 *Wis. L. REV.* 837.

³⁵¹ See *id.* at 865.

³⁵² See *id.* at 867.

³⁵³ See *id.* at 867-68.

³⁵⁴ See *id.* at 868.

³⁵⁵ See *id.* at 869-75. This is a simplification of the Verkerke analysis. Verkerke makes clear that a majoritarian default rule must take into account not only that a majority of all market participants prefer a certain result, but also the scope of application for each default rule. See *id.* at 875-79. This refinement of the rule is not relevant to my critique of Verkerke's analysis.

contracting with employees. Verkerke's empirical data is based on how the workplace orders itself now, given the uneven and inadequate patchwork of state and federal protections for employees. The use of this data assumes either that individual potential employees will have the power to bargain with prospective employers to reach mutually beneficial contractual arrangements or that, absent such power, individual employees will choose to work for employers who offer just cause protection.³⁵⁶

These assumptions are flawed. A variety of factors destroy an employee's ability to bargain freely over job security provisions. Employees often lack the knowledge or information that the default rule is employment at will. Although Verkerke acknowledges that asymmetry of information may occur, he argues that his data demonstrates that such asymmetry does not affect the relationship between employers and employees. He notes that in most workplaces all employees have the same type of contracts. He argues that this suggests that even the most informed employees choose not to bargain for just cause provisions.³⁵⁷ Moreover, he notes that even though employees of some industries are better informed than others, there is substantial uniformity across industries with regard to the percentage of employers and employees who contract for a just cause requirement.³⁵⁸ This evidence suggests, according to Verkerke, that more sophisticated employees who are knowledgeable about the law voluntarily choose not to bargain for just cause provisions in their contracts.³⁵⁹

This conclusion does not flow inexorably from the data. Lack of information does not exist in a vacuum. Even employees with knowledge of the law possess less bargaining power than employers. An example that Professor Verkerke uses to support his theory demonstrates my point. Verkerke notes that although beginning associates in law firms have knowledge of the employment at will doctrine, none of the law firms in his sample offered a just cause contract to associates.³⁶⁰ From this data, Verkerke concludes that associates voluntarily chose not to bargain for a just cause requirement.³⁶¹

This conclusion, however, ignores all of the other factors that come into play when a potential associate negotiates with a law firm. The market for lawyers is flooded.³⁶² Beginning lawyers are fungible. Even students at the

³⁵⁶ See *id.* at 873-74.

³⁵⁷ See *id.* at 888-89.

³⁵⁸ See *id.*

³⁵⁹ See *id.* at 889.

³⁶⁰ See *id.*

³⁶¹ See *id.* at 888-89.

³⁶² See Schuyler Kropf, *Lawyers Lament Bad Apples in Profession*, POST & COURIER (Charleston, S.C.), May 5, 1996, at 1-A.

most highly regarded law schools are often unable to find positions in law immediately after law school.³⁶³ Students who have less impressive resumes encounter great difficulty finding jobs.³⁶⁴ Despite recent exceptions to the employment at will doctrine, the status quo in law firms' discussions with prospective associates is not to negotiate job security, other than to discuss that firm's policy on making associates into partners. Third year law students must deal individually with the law firms. Most third year law students who are fortunate enough to receive job offers are afraid to ask for a just cause provision in their contract. Since no other law firms offer such contracts, law students who get more than one offer cannot threaten their prospective employer that they will work for another firm if the employer does not grant their request for a just cause provision in their contracts. In essence, law firms have a cartel on the issue of just cause requirements. A prospective associate's acceptance of the status quo does not demonstrate that he voluntarily chose the employment at will doctrine to govern his relationship with his employer.

Verkerke interprets his data as if the prospective employer and employee actually entered into negotiations over the employment at will doctrine. This is not the reality. Of the 52% of employers who Verkerke found explicitly contract for the employment at will doctrine, the vast majority contract for at-will employment through employment manuals,³⁶⁵ which are normally not even distributed until after the applicant has accepted the job. Thus, even if the employee is aware of the employment at will doctrine, there is little opportunity to discuss these terms before entering into a contract with the employer.

Economic theory grossly underestimates both the power an employer holds and the difference in loss an employer and an employee will experience when one side decides to terminate the relationship. Like new associates, the vast majority of employees are fungible. When an employee quits, the employer can replace her relatively easily. The employer will have to bear the expense of searching for and training a new employee to do the job, but these costs are built into the employee's salary structure and the cost of goods produced and services provided by the employer.

Professor Verkerke asserts that the inequality of bargaining power

³⁶³ See *America's Best Graduate Schools*, U.S. NEWS & WORLD REP., Mar. 18, 1996, at 79, 82 (demonstrating that among the top 10 law schools, up to 12% of graduates did not have jobs six months after graduation; for other law schools, up to 58% of graduates did not have jobs after six months).

³⁶⁴ See Ann Landers, *The Market Is Flooded with Would-Be Lawyers*, LEDGER (Lakeland, Fla.), Dec. 26, 1995, at D4.

³⁶⁵ See Verkerke, *supra* note 350, at 867 (stating that 61% of all employers use the employee handbook as the contract vehicle, whereas only 12% specify discharge terms on their employment applications).

argument makes no economic sense.³⁶⁶ He describes the bargaining power argument as one asserting that employers will exploit their power over employees by refusing to provide just cause provisions in contracts, even though employees value the protection more than it would cost the employer to provide.³⁶⁷ He argues that "[e]mployers have no conceivable incentive to impose contract terms that diminish the value of the employment relationship."³⁶⁸ Most employers, however, are unaware of the cost of providing just cause provisions while employees are unaware of their benefits. Verkerke never addresses this failure.

Even assuming that employers and employees had full knowledge of the costs to the employer and the benefits to the employee of a just cause provision, rational employers would not necessarily be motivated by cost and profits alone. Americans tend to have a strong strain of individualism which resists encroachment upon their rights to do as they please with their property. This strain is evident in management's argument that it should have the freedom to hire, fire, and promote whomever it desires for whatever reason it desires. This individualistic strain, combined with a conservative desire to maintain the status quo even in the presence of perfect knowledge about the costs of a just cause contractual provision, influences an employer's use of its bargaining power when hiring new employees.

An employee who is discharged without just cause is an innocent victim of the employment at will doctrine. Dismissed employees suffer economic loss, relocation costs, depression, and loss of self esteem.³⁶⁹ Often employees who lose their jobs are members of two income households and are therefore unable to relocate to take new positions.³⁷⁰

The average worker finds herself in the same position as that of blacks and women before the existence of the antidiscrimination laws. Before the state and federal antidiscrimination laws, blacks and women were hired less frequently for good jobs and at a lower salary. Individual women and blacks lacked the ability to negotiate for better salaries by threatening to work for different employers since most, if not all, employers underpaid them for their services. Federal and state governments played an important role in attempting to correct

³⁶⁶ See *id.* at 909-12.

³⁶⁷ See *id.* at 910.

³⁶⁸ See *id.*

³⁶⁹ Kibok Baik et al., *Correlates of Psychological Distress in Involuntary Job Loss*, 65 PSYCHOL. REP. 1227 (1989); N.T. Feather & J.G. Barber, *Depressive Reactions and Unemployment*, 92 J. ABNORMAL PSYCHOL. 185 (1983).

³⁷⁰ In the rare exception where the employee possesses equal or even greater power than the employer, such as the case of a famous athlete, the parties can negotiate a contract of employment that will protect the interests of the employer and the employee.

the problem by enacting protective legislation. Similar legislation is necessary to correct the imbalance of power between employers and average employees today. The legislation should be narrowly tailored to protect the interests of employees without placing an inordinate burden on employers.

As scholars have already noted, European workers have much more job security than their counterparts in the United States.³⁷¹ In virtually every industrialized country other than South Africa, employers must have just cause to dismiss employees.³⁷² All of the other major industrialized countries have ratified Convention No. 158 of the International Labor Organization, which forbids employers from terminating employees without just cause.³⁷³ The

³⁷¹ See generally EMPLOYMENT SECURITY LAW AND PRACTICE IN BELGIUM, BULGARIA, FRANCE, GERMANY, GREAT BRITAIN, ITALY, JAPAN AND THE EUROPEAN COMMUNITIES (Roger Blanpain & Tadashi Hanami eds., 1994) [hereinafter EMPLOYMENT SECURITY LAW AND PRACTICE]. The contributors to this effort note that "employment security" can mean many different things to different people. In a more limited sense, it means that one's job is secure. A broader interpretation of this term is the concept of job creation and full employment as a policy. See *id.* at 13. This latter interpretation is beyond the scope of this Article.

As the economy has declined in European countries and Japan, labor lawyers in those countries have reported increased age and sex discrimination. See *id.* at 37-38. Any proposal to grant job security in this country would have to take this phenomenon into account and guard against it. See also Madeleine M. Plasencia, *Employment at Will: The French Experience as a Basis for Reform*, 9 COMP. LAB. L.J. 294 (1988).

³⁷² See Plasencia, *supra* note 371, at 316.

³⁷³ The International Labor Organization ("ILO"), an organization established in 1919 which aims to promote social justice, has a tripartite structure, composed of representatives of governments and of workers' and employers' organizations. [Codex] R. BLANPAIN & C. ENGELS, INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS, ILO-11 (1994). Approximately 150 nations are members of the organization. See *id.* The ILO has three main bodies: the International Labour Conference ("Conference"), the Governing Body and the International Labour Office. See *id.* The Conference acts as an international legislature, consisting of national delegations, each of which includes government, employer, and worker delegates. The Conference adopts conventions and recommendations by a two-thirds majority of the delegates. Member states of the ILO are obligated by the adoption of the Conventions and Recommendations to submit them to the legislature or other competent authority in their nation and to supply to the Conference reports as to whether their respective nations have ratified the Conventions and Recommendations. Once a member ratifies a Convention by registering with the Director-General of the ILO, the Convention is binding on that member. A member that does not ratify the Convention is not bound by it. See ILO CONSTITUTION, reprinted in BLANPAIN & ENGELS, *supra*, at ILO-11-21.

In 1982, the ILO adopted Convention 158 covering termination of employees. See ILO CONVENTION 158, reprinted in BLANPAIN & ENGELS, *supra*, at ILO-343-54. Article 4 of this Convention forbids employers from terminating employees "unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the

United States, however, was the only member nation whose government representatives opposed Convention No. 158.³⁷⁴ Evidently, the United States opposed the Convention because it would erode the employment at will

operational requirements of the undertaking, establishment or service." *Id.* Part II, Div. A, Art. 4, *reprinted in* BLANPAIN & ENGELS, *supra*, at ILO-344-50. Although the Convention applies generally to all employees, it permits member states to exempt workers with contracts for specified time periods, workers on periods of probation, and workers engaged on a casual basis for a short period. *See id.* Part I, Art. 2, 2(a)-(c), *reprinted in* BLANPAIN & ENGELS, *supra*, at ILO-343. The Convention specifically excludes from the definition of "valid reason," firing on the basis of the employee's seeking office, union membership, race, color, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction, social origin, absence from work during maternity leave, temporary absence from work due to illness or injury. *See id.* Part II, Div. A, Arts. 5, 6, *reprinted in* BLANPAIN & ENGELS, *supra*, at ILO-344-51. A worker who believes he has been terminated in violation of the Convention has the right to bring an "appeal" to an impartial body, which can include a labor tribunal, an arbitration panel, a court or an arbitrator. *See id.* Part II, Div. C, Art. 8, *reprinted in* BLANPAIN & ENGELS, *supra*, at ILO-351. Either the employer bears the burden of proving that the termination was justified or the body hearing the case "shall be empowered to reach a conclusion on the reason for the termination having regard to evidence provided by the parties and according to procedures provided for by national law and practice." *Id.* Part II, Div. C, Art. 9, 2(a)-(b), *reprinted in* BLANPAIN & ENGELS, *supra*, at ILO-351-52. If it finds that the termination is unjustified, the body hearing the appeal shall declare the termination invalid and may order reinstatement or shall order payment of adequate compensation or other relief deemed appropriate. *See id.* Part II, Div. C Art. 10, *reprinted in* BLANPAIN & ENGELS, *supra*, at ILO-352.

A worker whose employment is terminated is entitled in accordance with national law and practice to severance pay or other separation benefits or unemployment insurance. *See id.* Part II, Div. E, Art. 12, *reprinted in* BLANPAIN & ENGELS, *supra*, at ILO-352-53.

Convention 158 also requires employers who are terminating employees for economic, technological, structural, or similar reasons to provide to the workers representative notice of the terminations, with the reasons for the termination contemplated, the number and categories of workers likely to be affected and the period over which the terminations will occur, and to give the representative an opportunity for consultation on measures to be taken to avert or minimize terminations, in accordance with national law and practice. *See id.* Part III, Div. A, Art. 13, *reprinted in* BLANPAIN & ENGELS, *supra*, at ILO-353. It also requires the employer to notify the competent authority in accordance with national law. *See id.* Part III Div. B., Art. 14, *reprinted in* BLANPAIN & ENGELS, *supra*, at ILO-353-54.

Only seven member states had representatives who voted against the adoption of Convention 158. *See* Plasencia, *supra* note 370, at 316 n.199. Of the seven, the United States was the only country whose government representatives opposed the Convention. *See id.* (citing ILO, INTERNATIONAL LABOUR CONFERENCE CONVENTION CONCERNING TERMINATION OF EMPLOYMENT AT THE INITIATIVE OF THE EMPLOYER, 68th Sess. ILO Convention, No. 158 (1982)).

³⁷⁴ *See* Plasencia, *supra* note 371, at 316 n.199.

doctrine.³⁷⁵ The United States feared that American companies with subsidiaries abroad would have to comply with the Convention. Interestingly, even though American companies with subsidiaries abroad have had to comply with the labor law in the countries where the subsidiaries are located,³⁷⁶ American companies operate large numbers of subsidiaries in France and Great Britain.³⁷⁷ The European laws do not seem to have affected the productivity of these companies.³⁷⁸

B. Statutory Exceptions: Montana, Virgin Islands, and Puerto Rico

Even though scholars in this country have urged the courts and legislatures to increase job security, no court has ever abolished the employment at will doctrine. Only Montana,³⁷⁹ the Virgin Islands,³⁸⁰ and Puerto Rico³⁸¹ have done

³⁷⁵ See *id.* at 317 n.202.

³⁷⁶ See *id.* at 318.

³⁷⁷ See *id.*

³⁷⁸ See *infra* notes 429–45 and accompanying text.

³⁷⁹ The Montana Wrongful Discharge From Employment Act (“Montana Act”) seems designed to protect the interests of business rather than those of employees. According to the Montana Act, a discharge is wrongful only if:

- (1) it was in retaliation for the employee’s refusal to violate public policy or for reporting a violation of public policy; or
- (2) the discharge was not for good cause and the employee had completed the employer’s probationary period of employment; or
- (3) the employer violated the express provisions of its own written personnel policy.

MONT. CODE ANN. § 39-2-904 (1993).

The Montana Act defines “good cause” as “reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer’s operation, or other legitimate business reason.” MONT. CODE ANN. § 39-2-903(5) (1993). The Montana Supreme Court has interpreted “legitimate business reason” broadly. See *Buck v. Billings Mont. Chevrolet*, 811 P.2d 537, 541 (Mont. 1991) (interpreting legitimate business reason to include a desire of an acquiring company to place its own person in an upper echelon job even though the person replaced was an exemplary employee).

The Montana Act preempts all common law causes of action for discharge arising from tort, express contract, or implied contract. See MONT. CODE ANN. § 39-2-913. A prevailing plaintiff under the Montana Act may collect lost wages and fringe benefits for a period not to exceed four years from the date of discharge. See MONT. CODE ANN. § 39-2-905(1). Punitive damages are available if the employee can show by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge of an employee in violation of public policy. See MONT. CODE ANN. § 39-2-905(2). This is an extremely narrow set of

circumstances under which punitive damages can be awarded. The Montana Act exempts causes of action covered by federal and state discrimination statutes. *See* MONT. CODE ANN. § 39-2-912(1), and persons covered by a collective bargaining agreement. *See* MONT. CODE ANN. § 39-2-912(2).

There is no fee shifting provision in favor of plaintiffs, and the plaintiff has the burden of proving a lack of good cause or other reason for a wrongful discharge. Because there is no fee shifting provision, because recovery is limited to a maximum of four years' salary, and because the plaintiff has a duty to mitigate his damages, *see* MONT. CODE ANN. § 39-2-905(1), finding attorneys to take these cases may create serious problems for discharged employees.

The Montana Act was passed primarily as a result of pressure from the defense bar because of the liberal decisions by the Montana Supreme Court that granted employees' rights. *See* LeRoy H. Schramm, *Montana Employment Law and the 1987 Wrongful Discharge From Employment Act: A New Order Begins*, 51 MONT. L. REV. 94, 108 (1990). But the Montana Act does give some protections to employees who otherwise may not be protected. *See id.* at 95.

³⁸⁰ In 1986 the Virgin Islands passed the Virgin Islands Wrongful Discharge Act ("Virgin Islands Act"), V.I. CODE ANN. tit. 24, §§ 76-79 (1993), which abolishes the employment at will doctrine in the Virgin Islands. The Virgin Islands Act sets up the permissible reasons for discharging an employee. Under the Virgin Islands Act, employers can discharge an employee for:

- (1) conflicts of interest;
- (2) offensive conduct toward a customer;
- (3) using controlled substances or alcohol which interferes with his or her work;
- (4) willfully and intentionally disobeying reasonable work rules;
- (5) negligently performing work;
- (6) continuous absence;
- (7) incompetence or inefficiency;
- (8) dishonesty;
- (9) offensive conduct causing other employees to refuse to work with him; or
- (10) engaging in unprotected concerted activity.

Id. § 76.

The Virgin Islands Act also permits an employer to terminate employees if the business closes or if there is a general cutback due to economic hardship. *See id.* § 76.

If the employee is discharged for any reasons other than the permissible reasons described in the statute, the employer's action constitutes wrongful discharge. *See id.* A fired employee can file a written complaint with the Commissioner of the Department of Labor within 30 days of the discharge, *see id.* § 77(a), who holds a hearing within 10 days of service of the complaint. *See id.* § 77(b). Upon a finding of wrongful discharge, the Commissioner orders reinstatement with back pay. *See id.* § 77(c). The Commissioner may request the Territorial Court of the Virgin Islands to enforce the Commissioner's order. The Territorial Court considers the findings of fact of the Commissioner conclusive if there is substantial

so by statute. Of these three statutes, only the Virgin Islands' law is

evidence on the record considered as a whole to support them. The court can enforce the order, modify it, or set it aside. *See id.* § 78.

Additionally, the Virgin Islands Act provides that an employee may bring in any court of competent jurisdiction an action for compensatory and punitive damages stemming from the wrongful discharge. If the plaintiff prevails, the court shall award reasonable attorney's fees and costs to the plaintiff. *See id.* § 79. The Virgin Islands Act does not require the exhaustion of administrative remedies before bringing the action in court. *Hess Oil V.I. v. Richardson*, 10 IER Cases (BNA) 1360 (V.I. June 20, 1995).

Plaintiffs have a number of options under the statute. They can bring the administrative complaint before the Department of Labor and go into court after the proceeding, or they can go directly to the court under § 79 to seek compensatory and punitive damages. *See V.I. CODE ANN. tit. 24, §§ 77-79* (1993). The benefit of going through the administrative process is that if the employee wins his complaint, he should be reinstated with back pay within a relatively short time after his discharge. He then has the luxury of pursuing an action in court. Should the employee not desire to return to the workplace because of ill feelings or a hostile environment, he or she can choose to go directly to court to pursue his or her claim for compensatory and punitive damages. *See id.* § 79.

The Virgin Islands Act has a particularly interesting structure because by setting up the Department of Labor hearings within 40 days of the discharge, it focuses on returning wrongfully discharged employees to work expeditiously, but it does not sacrifice the possibility of collecting damages from the employer for its wrongful act.

This law is much more protective than the Montana statute because it protects the employee's property right to the job without sacrificing his or her right to sue in court to redress his loss of dignity. Also, the fee shifting provision should enable plaintiffs to obtain counsel more readily.

³⁸¹ The wrongful discharge statute in Puerto Rico provides less protection for the average worker suffering from wrongful discharge. Generally, it provides that an employee fired without just cause can collect one month's salary plus one week's pay for each year of service. *See P.R. LAWS ANN. tit. 29, § 185a* (1995). "Just cause" includes: a pattern of improper or disorderly conduct; inefficient or negligent work standards; repeated violations of reasonable rules; partial or full, permanent or temporary closing of the business; technological or reorganizational changes; changes in product make or services rendered; and reductions in force. *See id.* § 185b. There is no right to back pay, reinstatement, compensatory damages or attorney's fees.

There is one exception to this provision. Employees fired for offering oral or written testimony or an "expression or information before a legislative, administrative or judicial forum in Puerto Rico" can bring a civil action in court for back pay, benefits, compensatory damages, reinstatement, and attorney's fees. *See id.* § 194a. This expression does not have to relate to the employer's business for protection. Act No. 115, S.B. No. 987, 11th Leg., 1991 P.R. LAWS Act 115 (S.B. No. 987) (Statement of motives) (West, WESTLAW through portions of 1994 legislation). The only limitation is that an employer can legally discharge an employee for a defamatory statement or for disclosing privileged information protected by law. *See P.R. LAWS ANN. tit. 29 § 194a* (1995).

substantially protective of the employee's rights.³⁸²

C. *The Model Uniform Employment Termination Act*

The National Conference of Commissioners on Uniform State Laws approved the final version of the Model Uniform Employment Termination Act ("Model Act") on August 8, 1991.³⁸³ Since the approval of the Model Act in 1991, although ten states have introduced bills based on the Model Act, not one state has adopted it.³⁸⁴

Generally, the Model Act abrogates the employment at will doctrine, permitting employers to dismiss employees only for good cause.³⁸⁵ It grants a dismissed employee the right to file a complaint with a state commission or agency.³⁸⁶ Under the Model Act, a state commission has the responsibility to adopt rules and regulate procedures, to appoint the arbitrators, and to delegate as necessary the day to day operational functions to private agencies, such as the American Arbitration Society.³⁸⁷ The Model Act defines "good cause" as "a reasonable basis . . . in view of relevant factors and circumstances, which may include the employee's duties, responsibilities, conduct on the job or otherwise, job performance and employment record," or a good faith exercise of business judgment.³⁸⁸ The "good faith" exercise of business judgment exception permits employers to reorganize, discontinue operations or positions, downsize, and change standards of performance for particular positions without a finding of liability.³⁸⁹

Although authors of the Model Act worked assiduously to produce an act

³⁸² See *supra* note 380.

³⁸³ See MODEL UNIFORM EMPLOYMENT TERMINATION ACT, *reprinted in* 9A Lab. Rel. Rep. (BNA) 540:21 (Aug. 8, 1991) [hereinafter META]. A motion to approve the draft as a uniform law (rather than a model law) was defeated by a vote of 29 to 21. Approval of the draft as a uniform law would have required the commissioners to have a uniform measure introduced in each state legislature. The Model Act, although it fell short of becoming a uniform act, provides a guide to state legislatures.

³⁸⁴ The Model Act was introduced but rejected in the following states: 1992—Delaware (H.B. 293); Hawaii (H.B. 177); Iowa (S.B. 2158); Maine (L.D. 351); Massachusetts (H.B. 1452); Oklahoma (H.B. 1057); Pennsylvania (H.B. 2154); 1993—Massachusetts; Nevada (A.B. 343); New Hampshire (H.B. 513); 1994—Oklahoma (S.B. 609); 1995—Hawaii (H.B. 355); 1996—Hawaii (H.B. 353, S.B. 1226), Rhode Island. Information provided by the legislative assistant of the National Conference of Commissioners on Uniform State Laws.

³⁸⁵ See META § 3.

³⁸⁶ See *id.* § 5.

³⁸⁷ See *id.* § 6 and § 6 cmt.

³⁸⁸ *Id.* § 1(4).

³⁸⁹ See *id.*

that would eliminate the employment at will doctrine,³⁹⁰ and the Model Act includes some important protections for employees, it is unacceptable to employees. If a state were to adopt the Model Act, the combined effects of a series of pro-business provisions would do serious damage to the rights employees now possess, without giving them enough in return. For example, the Model Act places the burden on the employee to prove that the employer lacked good cause to fire him.³⁹¹ This allocation of the burden places the procedural disadvantage on the party with fewer resources and less access to the information he needs to meet the burden.

Moreover, the Model Act extinguishes all common law rights of a terminated employee against the employer or its agents "which are based on the termination or on acts taken or statements made that are reasonably necessary to initiate or effect the termination."³⁹² This section would eliminate most causes of action based on intentional infliction of emotional distress and defamation, among others.³⁹³ While this section was necessary in order to gain the support of business, it provides an extraordinary benefit to the employer given the limited benefit the employee gains from the Model Act.

Possibly the most precarious provision to employees' rights is the waiver provision. The Model Act permits employers and employees to "agree" to waive the good cause requirement if, in the absence of the employee's willful misconduct, the employer agrees to pay severance pay in an amount equal to one month's pay for each year the employee has worked for the company, up to a maximum of thirty months' pay.³⁹⁴ This waiver provision places a heavy burden on employees. It permits the employer, the party with the greater bargaining power at the time of entering the contract of employment, to insist upon a waiver as a condition of working for the employer,³⁹⁵ and to terminate

³⁹⁰ The Model Act was authored by some of the best minds in the area of employment law, many of whom have spent years arguing for greater rights for workers. The Reporter for the Committee, Professor Theodore J. St. Antoine of the University of Michigan Law School, was at the forefront, arguing for the abolition of the employment at will doctrine. I am aware that these eminent scholars and practitioners had to compromise with the business community to arrive at a Model Act that would be approved by the National Conference, and I know that no one else could have done a better job of authoring the Model Act.

³⁹¹ See META § 6(e).

³⁹² See *id.* § 2(c).

³⁹³ See *id.* § 2 and § 2 cmt. (c).

³⁹⁴ See *id.* § 4(c).

³⁹⁵ The comment on this section by the National Conference of Commissioners states: "It is the intent of Section 4 not to allow so-called 'contracts of adhesion' to be used to waive or otherwise circumvent employees' rights under the Act." *Id.* § 4 cmt. This comment, while giving employees an argument that the employer's contract was one of adhesion, does not adequately protect employees against employer power. See generally Stempel, *supra* note

an employee before her right to a sizable severance pay accrues.³⁹⁶ The waiver provision is particularly burdensome on employees given that if the employee "agrees" to sign the waiver, he also agrees to waive the right to bring common law causes of action arising from the discharge.

The greatest downfall of the Model Act, however, is the concept behind the Model Act itself. By its very essence, a model act relies on state by state adoption. It will necessarily give too much power to the interests of the business community. Business will exercise this power on two fronts. First, in the drafting of the model statute, business representatives will demand compromises from those who have the interest of employees at heart. Because business negotiates from the more powerful position—the employment at will doctrine is still alive and well—business will have the power to demand compromises that result in a greater benefit for business. Business will agree to provisions in the Model Act only to the extent the result will be an improvement for business. The Model Act is, in part, a result of these compromises.

The second front is the debate in the individual states themselves. Because the individual states compete with one another to attract business, it is nearly impossible politically to get individual states to pass legislation that would be adverse to the perceived interests of the business community. Thus, even if a legislator introduces a bill containing the Model Act or its equivalent into the state legislature, which I contend is already too favorable to business interests, it is highly likely that the bill will be diluted even further to attract the support of the business community.

Of course, if employees were totally powerless, business would not compromise at all. The power employees possess is the right to bring lawsuits based on wrongful discharge and other tort actions. This employee power can harm business in a number of ways. First, business will have to pay direct³⁹⁷ and indirect³⁹⁸ costs to defend the lawsuits, whether they win them or not.

197; Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TULANE L. REV. 1377, 1413-14 (1991). Given the Supreme Court's decision in *Gilmer*, it would be surprising if employees could win these arguments. See *supra* Part II.C.3.

³⁹⁶ Another provision in the Model Act confirms my judgment that this is the course that many employers would take. Section 14 permits an employer to impose on employees, as a condition of continued employment, the requirement that they enter into agreements to waive their rights under § 4(c) of the Model Act. If the employees refuse to sign, the employer can terminate them within six months after the effective date of the Model Act without any penalty. META § 14.

³⁹⁷ "Direct costs" are attorney's fees and costs of the litigation.

³⁹⁸ "Indirect costs" include the loss of employee time and productivity caused by protracted litigation. They could be extremely high. According to the authors of the Model Act, indirect effects of wrongful termination doctrines are 100 times as costly as the direct

Second, business will have to pay damages to prevailing plaintiffs or at least high insurance premiums to pay for its torts. Finally, the cost to business is somewhat unpredictable. The lack of predictability may be a cost in itself.

As the history of the Model Act demonstrates, however, this employee power alone is not sufficient to overcome the enormous strength business brings to the table. Individual employees lack a powerful group of representatives to negotiate on behalf of their interests. When individual employees lack union affiliation, the unions will not represent their interests in the process. Plaintiffs' attorneys, who often collect large sums representing individual employees, have economic interests that diverge from those of the vast majority of employees.

Moreover, even if employees at the state level have powerful groups to represent them, they cannot offer enough to employers to make it worth a compromise by business. A model act which necessarily addresses the problem at the state rather than the national level cannot include the federal antidiscrimination statutes in its purview. Because the Model Act cannot bring the antidiscrimination statutes to the negotiating table, employees lose their most powerful bargaining tool. Employees also lose their most powerful potential ally: the civil rights community. It may seem odd to consider the civil rights community as a potential ally that would agree to negotiate away the discharge portions of the federal antidiscrimination law, but I believe that the civil rights community needs to consider doing exactly that. I have documented above in Part II the expense of bringing antidiscrimination claims and the courts' poor enforcement of plaintiffs' civil rights. It appears that it is time to negotiate with business for a federal statute that would protect the rights of all employees against wrongful discharge. With the rights arising from the discharge components of Title VII and the ADEA as well as state antidiscrimination statutes and common law causes of action on the negotiating table, employees will have more substantive power. They should also have the force of the powerful civil rights lobby behind them. Finally, because this is federal rather than state legislation, business will lose its power to threaten to move to another state in order to avoid the legislation.

IV. AN OMNIBUS FEDERAL "JUST CAUSE" EMPLOYMENT STATUTE

A proposal for change should address the causes of the decline of civil rights in employment while also accommodating workers not protected by the civil rights statutes. The proposal should remove a substantial number of cases from the federal judiciary; the federal judiciary's conservative ideology and the pressure from crowded dockets to decide cases quickly make the federal courts

an undesirable forum for employees. It should shift the burden of persuasion to the employer, eliminating the problems of inadequate proof evident in *St. Mary's*. It should refocus the inquiry from the employer's intent to the ultimate question of whether the employer actually discriminated, consciously or subconsciously. It should abolish the employment at will doctrine, eliminating the refuge the courts found in the doctrine in *St. Mary's*³⁹⁹ and *Visser*.⁴⁰⁰ Finally, it should cover all employees, both those who are currently members of the protected classes and those who are not, avoiding a backlash from unprotected workers against protected workers.

Given these standards, a number of the potential remedies to the decline in enforcement of employment discrimination laws are too limited; they would likely repeat the problems discrimination victims have encountered in the past. For example, federal legislation that would reverse *St. Mary's* and *Gilmer* is not optimal. It would fail to change the ideology of a conservative judiciary or to relieve the pressure on federal courts overburdened by crowded dockets. Given the Supreme Court's tendency since 1989⁴⁰¹ to cut back on the rights of employment discrimination plaintiffs, and the lower courts' willingness to grant summary judgment in inappropriate cases even in the face of the 1991 Act,⁴⁰² which was passed to enhance civil rights, this solution would likely fail. Moreover, this limited solution would do nothing to shift the burden of persuasion or to eliminate the intent requirement,⁴⁰³ and would continue to permit the employment at will doctrine to undermine a potential plaintiff's suit. It would do nothing to eliminate the backlash by unprotected workers.

Another possible solution would be to write model rules creating an arbitration system for employees who sign predispute arbitration clauses that

³⁹⁹ *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); see discussion *supra* Part II.C.2.

⁴⁰⁰ *Visser v. Packer Eng'g Assocs., Inc.*, 924 F.2d 655 (7th Cir. 1991) (en banc); see discussion *supra* notes 90-107 and accompanying text.

⁴⁰¹ In the summer of 1989, the Supreme Court decided a number of cases that threatened the protections afforded employees by the civil rights laws. See cases cited *supra* note 248. The 1991 Act was passed, in part, to reverse those decisions. See McGinley, *supra* note 4, at 203-06.

⁴⁰² See generally Ann C. McGinley, *Reinventing Reality: The Impermissible Intrusion of After-Acquired Evidence in Title VII Litigation*, 26 CONN. L. REV. 145 (1993); McGinley, *supra* note 4.

⁴⁰³ Federal legislation overturning *St. Mary's* and *Gilmer* could shift the burdens of persuasion and eliminate proof of discriminatory intent. Such legislation, if it could ever pass, would go a long way toward correcting the problems evident in civil rights enforcement. But even this legislation, which I believe would be very difficult to sell politically, would not avoid a backlash by unprotected workers.

are as protective as possible of plaintiffs' civil rights.⁴⁰⁴ This is an attractive possibility because it would not require legislation on the federal level. However, as noted in Part II.C.3 above, there is a question whether any predispute agreement to arbitrate can be knowing and voluntary. Moreover, although a model of arbitration that is built on the current system would presumably relieve some of the docket pressure on the federal courts, it would do nothing to change the conservative ideology of federal judges. With arbitration of employment discrimination discharge disputes coexisting with adjudication of the same type of disputes in court, the protection granted by the arbitrators will, at best, reflect the federal courts' interpretation of the civil rights acts. To the extent that the federal courts misinterpret the law, the arbitrators will likely follow suit.

A further weakness of this solution is that it does nothing to prevent the distortion of civil rights law through hypertechnical adherence to the employment at will doctrine, the plaintiff's burden of proof, and the requirement of discriminatory intent. Neither does it destroy the forces leading to a backlash from unprotected workers. Thus, a mere attempt to duplicate the federal forum in arbitration, except for its expensive and timely procedures, is an inadequate solution to a multifaceted problem.⁴⁰⁵

Another question is whether a federal statute or a series of state statutes can better accomplish the goals enumerated above. Although there has been much concern about the "federalization of state law," most of the issues concerning federalization of state law are not present here. First, civil rights has always been the province of federal statutory law. Second, the statute I propose here would reduce rather than increase the burden on the federal courts because it would divert to arbitration the discharge cases of plaintiffs who may have otherwise sued under Title VII, the ADEA and other federal acts.⁴⁰⁶

I propose federal legislation⁴⁰⁷ similar to that in the Virgin Islands,⁴⁰⁸ forbidding dismissal without just cause of all employees who have finished a probationary period. This is a radical change to the present system because it

⁴⁰⁴ This is happening spontaneously. For example, The Association of the Bar of the City of New York has at least one group working on this issue: the Committee on Labor and Employment Law. *See Final Report, supra* note 232.

⁴⁰⁵ The New York Model Rules fail for all of these reasons. *See supra* note 232.

⁴⁰⁶ Moreover, in order to avoid giving some states an undue advantage attracting industry over others, there needs to be uniformity in the law.

⁴⁰⁷ Because a just cause provision would "substantially affect" interstate commerce, it seems that Congress would have the constitutional authority to pass this type of legislation. *Cf. United States v. Lopez*, 115 S. Ct. 1624, 1630 (1995) (using the commerce clause to strike down the constitutionality of federal legislation that made it a crime to possess a firearm near a school because the law did not substantially affect interstate commerce).

⁴⁰⁸ *See supra* note 380.

would extinguish all rights of individual plaintiffs alleging discriminatory discharge under Title VII, the ADEA, and 42 U.S.C. Section 1981, while creating new rights for all employees to maintain their jobs in the absence of just cause. Although the drafting of the provisions of the statute is beyond the scope of this Article, I will outline my proposed solution.

The statute should require arbitration of the plaintiff's wrongful discharge claim.⁴⁰⁹ Arbitration when properly focused can provide a fair and speedy resolution of the employment dispute, returning the employee to work, where appropriate, in a relatively short time.⁴¹⁰ A speedy resolution favors the

⁴⁰⁹ This proposal would replace the discharge portions only of Title VII, the ADEA, and 42 U.S.C. § 1981, and it would preempt discharge portions of state and local human rights statutes. At this point, because the ADA requires much different proof, I do not envision this model to encompass ADA suits. It would also be impossible to apply this scheme to failure to hire cases under Title VII, the ADEA, or § 1981. If it were to apply to failure to hire cases, every disappointed job applicant would bring an arbitration requiring the employer to justify its decision. This result would be unmanageable and harmful to management's interests. Instead, I would continue Title VII and the ADEA as they are for failure to hire cases, permitting the EEOC or other organizations to bring systemic disparate treatment and disparate impact suits using testers. See Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs*, 26 U. MICH. J.L. REFORM 403 (1993); Leroy D. Clark, *Employment Discrimination Testing: Theories of Standing and a Reply to Professor Yelnosky*, 28 U. MICH. J.L. REFORM 1 (1994); Michael J. Yelnosky, *Salvaging the Opportunity: A Response to Professor Clark*, 28 U. MICH. J. L. REFORM 151 (1994).

⁴¹⁰ An alternative to arbitration would be specialized labor courts. These federal labor courts would be similar to bankruptcy courts in that the judges selected for the courts would have a specialized knowledge in the areas of labor, employment, and antidiscrimination law. They would have the authority to decide cases, which would be appealable to the federal district courts. The appeals would be limited to the questions of whether the labor courts interpreted the law incorrectly or made findings of fact that had no basis in the evidence. These specialized courts would be similar to the industrial tribunals in England that have jurisdiction over discharge matters. See Glen D. Newman, *The Model Employment Termination Act in the United States: Lessons from the British Experience with Uniform Protections Against Unfair Dismissal*, 27 STAN. J. INT'L L. 393, 417-18 (1991). This system, however, would have its weaknesses. In England, for example, discharged employees have a very low rate of success before industrial tribunals. See *id.* at 420-21. In 1981, for example, industrial tribunals decided approximately 23% of the cases in favor of the employee. See *id.* at 430. Between 1978 and 1982, fewer than 30% of the plaintiffs prevailed. See *id.* Moreover, in 1981, only 1.1% of all complainants who brought their cases before the industrial tribunals were awarded reinstatement. See *id.* At least one scholar attributes this low rate of success to the tribunal's deference to the employer's discharge decision and the tactical advantage an employer has over an unrepresented employee at the tribunal. See *id.* Glen Newman believes that arbitration panels in the United States may be more evenhanded in deciding labor disputes. See *id.* at 432.

employer as well as the employee, permitting both parties to plan for their futures and to avoid the high cost of extensive litigation.⁴¹¹ The panel of arbitrators should have experience in labor arbitration⁴¹² and in civil rights law.

The statute would place the burden of persuasion on the employer because the employer has exclusive control over the information to prove his case. The employer's burden is to prove two essential elements: (1) just cause for firing the employee, and (2) that the just cause was the actual cause for the

⁴¹¹ In an attempt to protect employers from an overwhelming number of arbitrations, I am not including discipline that falls short of discharge in my proposal. Persons who are disciplined unfairly due to their membership in a protected class can still bring a lawsuit in federal or state court to redress their dignity rights to the extent the discipline rises to the level of discriminatory treatment or harassment.

⁴¹² Labor arbitrators have experience deciding whether just cause for firing exists. Although most labor contracts do not define "just cause," there has emerged in labor law a common law of interpreting just cause provisions that may be useful in this context. In determining whether just cause exists, labor arbitrators use their judgment and discretion. In using their discretion they begin by asking seven questions:

1. Did the employee have forewarning of the possible consequences of the employee's conduct?

2. Did the company's rule or managerial order allegedly violated by the employee relate to the orderly, efficient, and safe operation of the employer's business and was it related to the performance that the company might reasonably expect of the employee?

3. Did the company, before discharging the employee, make an effort to find out whether the employee violated the rule or order?

4. Was the company's investigation conducted fairly?

5. At the company investigation, did the judge have substantial proof of a violation?

6. Did the company apply its rules evenhandedly to all employees without discrimination?

7. Was the discharge reasonably related to the seriousness of the offense and to the record of the employee in service to the company?

See MARVIN HILL, JR. & ANTHONY V. SINIEROPI, *REMEDIES IN ARBITRATION* 139-40 (1991).

If the answer to any of these questions is "no," the discharge will typically not be backed by "just cause."

Because I am proposing a scheme that would protect managerial employees as well as workers typically covered by union contracts, the formulation of the standard might differ slightly. However, these seven questions are very adaptable. Because they take into account the very issue of discriminatory treatment, labor arbitrators may be well suited to decide whether just cause exists, so long as they are cognizant of the civil rights in employment laws and subtle forms of discrimination. This is the reason I suggest that the arbitration panel have experience in both labor law and employment discrimination law.

My suggestion that labor arbitrators should decide wrongful discharge disputes is not new. Professor Clyde Summers first suggested the use of labor arbitrators to resolve employment disputes between employers and non-union employees who are discharged. See Summers, *supra* note 9.

discharge.⁴¹³

"Just cause" would include any cause that would protect an employer's legitimate business interests, including, employee misconduct, incompetence, and repeated lateness. In order to maintain its burden, the employer would have to prove that it treated other employees similarly. Unless the employee's conduct was egregious, such as a physical attack on a coworker, the employer would also have to prove that it gave the employee notice of the company rules or policy and a warning to discontinue his behavior.

As a defense to the employer's proof, the employee could cross-examine the employer or present evidence on the issue of causation. For example, an employee could rebut the employer's showing by cross-examining the witness or presenting evidence tending to show that there was no just cause, or that the employer's alleged reason for the discharge was not the real reason for the discharge. Where appropriate, this evidence could include direct evidence of discrimination or evidence of discriminatory remarks, or differential treatment of similarly situated persons who were not members of the protected class. This evidence would not focus on the employer's intent, but rather on the employer's behavior in dealing with members and nonmembers of protected classes.

The burden of persuasion is always on the employer. Therefore, the employee does not have to present any evidence if the employer's story does not reach the preponderance of the evidence standard.⁴¹⁴ If the employer's evidence presents a *prima facie* case,⁴¹⁵ the burden of going forward shifts to the employee to present evidence. Once introduced, this evidence would shift the burden of production once more to the employer to prove that it treated other employees similarly.

In order to save time and the parties' finances, the statute should require the employer and the employee to exchange relevant information and documents

⁴¹³ Typically in labor arbitrations, it is the employer's burden to prove just cause for the discipline imposed. However, many arbitrators look to see merely if just cause exists, not whether the cause given was the actual cause of the dismissal. My scheme would not permit the use of after-acquired evidence to justify a dismissal. See McGinley, *supra* note 402, at 172-75.

In France, the just cause requirement requires the judges to find the actual existence of the alleged fact which constituted cause for dismissal as well as the fact that the cause alleged is the true reason for the dismissal at the time of the dismissal. See Jacques Rojot, *France, in EMPLOYMENT SECURITY LAW AND PRACTICE*, *supra* note 371, at 111, 118.

⁴¹⁴ Although in many labor cases, the standard required of an employer is higher than the preponderance of the evidence, this standard should be adequate to protect the employee's interests without making it too difficult for employers to prove just cause where it exists.

⁴¹⁵ I use the term "*prima facie* case" in the traditional evidentiary sense, not in the way it is commonly used in Title VII litigation. See McGinley, *supra* note 4, at 215 n.47.

before the arbitration. The legislation should require the employer to keep certain types of records that would contain the most relevant information for lawsuits. Most of these records would be those that are already prepared by employers either by law or voluntarily. For example, employers would be responsible for keeping a file on each individual employee with the employee's salary history and performance reviews. Each employee should have the right to examine his or her own personnel file. Furthermore, the employer would be required to keep demographic information concerning its workforce that may be relevant to rebut the employer's proof of just cause. This information, too, must be kept publicly and shared with the employee who alleges a wrongful discharge. These simple requirements will substantially reduce the time and cost of discovery.

This proposal would cover all wrongful discharge cases brought by employees who have passed the probationary period of employment. It would cover employees who today would not have a cause of action under the federal antidiscrimination suits as well as those who today would allege a violation of federal or state employment discrimination statutes.⁴¹⁶ Arbitration would resolve the property rights dispute. Because it would resolve disputes between the employer and the employee more quickly, arbitration would be a less costly alternative and would provide a realistic opportunity to reinstate a wrongfully discharged employee.

The arbitrators would have the power to reinstate and to grant back pay for the lost property right. Employees and employers would have the right to be represented by counsel at the arbitration proceedings. The arbitrators should award attorney's fees and costs to the employee if the employee prevails.

An employer's potential advantage as a "repeat player" who regularly submits its cases to the arbitrators can be overcome. Attorneys representing employees before arbitration panels will establish specialties in the area and will become acquainted very quickly with the habits of members of the arbitration panels. Moreover, in the event that certain employees cannot afford attorneys or do not want representation, the law should specify that each place of employment whose employees are not represented by a union should have employee representatives who can advise clients in a confidential manner and represent them before the arbitration panels. These employee representatives would be lay advocates who would be aware of the law and of the particular quirks of the members of the arbitration panels. Any information gained by counseling fellow employees would be privileged and unreachable by the employer.

Both parties could appeal the panel's decision to the federal district court.

⁴¹⁶ It would also cover all discriminatory discharge suits brought under 42 U.S.C. § 1981 (1994).

In the event that the arbitrators misinterpreted the law or made findings of fact that had no basis in the evidence, the district court would reverse the arbitrators' decision.⁴¹⁷ This system of appeals should help to avoid inconsistent rulings concerning the applicable law. It should also correct the most egregious factual errors made by arbitration panels without placing an undue burden on the federal courts.

Employees alleging both a property loss and a loss of dignity would have two options: (1) they could go to arbitration to resolve their property loss claims and later bring their dignity loss claims in federal⁴¹⁸ or state court, or (2) they could forego reinstatement and back pay and go directly to the state or federal court to redress their dignity rights.⁴¹⁹

If the employee chooses the first option and goes to arbitration alleging wrongful discharge, the arbitrator's decision, if it relates to the question of harassment, defamation, or intentional infliction of emotional distress, will not be binding on the jury, but may be considered by the jury as evidence.⁴²⁰ If a plaintiff can claim common law violations such as defamation and intentional infliction of emotional distress, battery, and false imprisonment exclusively, he or she would bring these claims in state court rather than federal court. If the claim is based on sexual or racial harassment, the plaintiff would have the option of bringing the claim in state or federal court as she has today. In court, the litigant would have the right to a jury trial and the court would have the power to award compensatory and punitive damages.⁴²¹ If the court finds that sexual or racial harassment took place, the court would award attorney's fees

⁴¹⁷ To avoid a burden on the federal district court, the district court would likely assign the appeals to United States magistrates to write reports and recommendations to be submitted to the district court judges for approval. Each district could appoint a number of magistrates with experience in labor and employment law to cover these appeals.

⁴¹⁸ I would limit the dignity loss claims to be brought in federal court to sexual or racial harassment, over which the federal courts already have jurisdiction through Title VII, because of the important national policy of guaranteeing equality of all persons before the law, regardless of sex or race.

⁴¹⁹ I would not require plaintiffs to file charges with the EEOC because the EEOC involvement merely delays the proceedings. *See supra* Part II.B.

⁴²⁰ This is similar to the treatment of an EEOC determination that there is no probable cause. *See, e.g.,* *Barfield v. Orange County*, 911 F.2d 644, 650-51 (11th Cir. 1990) (holding an EEOC determination of probable cause admissible in both jury and nonjury trials); *McClure v. Mexia Indep. Sch. Dist.*, 750 F.2d 396, 400 (5th Cir. 1985) (holding EEOC finding admissible but not binding on the jury); *compare* *Johnson v. Yellow Freight Sys., Inc.*, 734 F.2d 1304, 1309 (8th Cir. 1984) (admissibility within discretion of trial judge).

⁴²¹ I would not place a cap on the compensatory or punitive damages permitted by the statute for harassment.

and costs.⁴²²

In causes of action for a loss of dignity rights at the workplace, the employee will continue to have the burden of persuasion because, unlike in the property loss cases, there is usually direct evidence to support claims of harassment, intentional infliction of emotional distress, and defamation.

This scheme will not enhance or reduce the employee's rights or change the order or burden of proof in cases alleging a loss of dignity. For the cases where the employee is alleging a wrongful loss of property right, however, the scheme enhances the employee's rights and changes the order and burden of proof. It eliminates the employment at will doctrine, broadening the property right to a job; for those cases that currently would be brought under Title VII or state employment discrimination statutes, it eliminates proof of intentional discrimination and shifts the burden to the employer to prove that it had just cause to dismiss the employee.

This system gives something to both management and workers. Management benefits because more employment disputes will be resolved in arbitration, a quicker, less expensive option than litigation in court. Workers benefit because the system converts their expectations of industrial justice into law. Workers who otherwise would not have a wrongful discharge claim can bring a claim before an arbitration panel which will determine whether the employer had just cause for firing the employee.

Furthermore, the scheme avoids most of the problems in the enforcement of the employment discrimination statutes without sacrificing civil rights in employment. By broadening the property right to one requiring an employer to have a just cause for dismissal, the scheme avoids pitting workers against one another, eliminating the present backlash against the employment discrimination statutes. By placing the burden of persuasion on the employer to prove just cause, it eliminates the difficulties presented by the present method of allocation

⁴²² My proposal does not violate the Seventh Amendment right to a jury trial. The Seventh Amendment was passed in 1791 and preserves the right to a jury trial. *See* U.S. CONST. amend. VII. To determine whether the parties have the right to a jury trial under the Seventh Amendment, the court will consider whether the cause of action is analogous to a cause of action existing at law at the time of passage of the Seventh Amendment and the type of remedies the plaintiff seeks. *See* *Tull v. United States*, 481 U.S. 412, 417-25 (1987). Recently, the Court has placed more emphasis on the remedy. *Chauffeurs, Teamsters and Helpers Local 391 v. Terry*, 494 U.S. 558, 564-65 (1990). If the remedy is damages, there will be a jury trial right that Congress cannot abrogate through statute. *See id.* at 565. If, however, the remedy sought is equitable, there is no right to a jury trial. *See id.* Because the arbitration portion of my proposal would grant reinstatement with back pay, but would not offer compensatory and punitive damages to wronged employees, there should be no constitutional right to a jury trial abrogated by the statute. My proposal continues to grant jury trials to plaintiffs alleging a loss of dignity and compensatory and punitive damages.

of shifting burdens and properly places the burden on the party who is in exclusive control of the information. By eliminating the need to prove the employer's intent, the scheme focuses on the employer's behavior rather than its thought process, which has always been difficult to prove. By requiring that the property loss claims be brought before arbitration panels, the model avoids overburdening the federal courts⁴²³ and makes the process more affordable to litigants. Arbitration also permits a much faster resolution of the employment dispute, which will permit both the employer and the employee to move beyond the dispute.

Assuming that discharge or refusals to promote without good cause can be rational, an assumption that I have substantiated in Part II.C.4.c above, the question becomes whether creating a just cause standard is worth the cost. Although a complete cost analysis is beyond the scope of this Article, it appears that the costs of this proposal would not exceed its value. Whereas the costs of arbitration could be substantial, employers will avoid extensive, costly employment discrimination litigation cases,⁴²⁴ as well as large awards granted under common law exceptions to the employment at will doctrine.⁴²⁵ The

⁴²³ This scheme will actually eliminate from the federal court dockets most of the employment discrimination cases brought in federal court. Although it adds an appellate function for the federal courts, the scope of review is limited.

⁴²⁴ Employers are already spending vast amounts defending these suits and trying to avoid litigation. See DUNLOP COMMISSION FACT FINDING REPORT, *supra* note 47. Furthermore, there are different possible scenarios for funding the arbitrators' fees. If the employer were to fund the entire amount of the fees, the integrity of the arbitration would be suspect. If each side bears its own costs, the fees could be expensive for employees who have lost their jobs. A possible solution would be to permit the arbitrators to order that the employer pay the entire fee amount if there is no just cause. If just cause is found, the employee would be responsible for a portion of the fees equal to two days' salary. The employer would pay the balance. A third possibility would be for there to be a fund collected by the government similar to the interest funds on lawyers' trust accounts that would pay the arbitrators' fees. This system would guarantee the integrity of the panel.

⁴²⁵ Although the causes of action in tort for loss of dignity will survive, causes of action based on contract principles such as employee handbooks will not survive. Even those persons having a dignity loss claim may forego a suit for dignity loss and go to arbitration to be reinstated instead. Although they would have the right to bring suit in court after reinstatement, for purposes of industrial peace, they may give up that right in favor of reinstatement.

This scheme should reduce the cost of wrongful discharge claims. A recent study of plaintiffs receiving jury awards in wrongful discharge cases in California from 1980-1986 demonstrates that the average payment a winning plaintiff receives after deducting attorney's fees is \$125,000 whereas the combined average sum of plaintiff's and defense's attorney's fees is \$164,000. The transaction costs are nearly 60% of the total amount of money changing hands. See DERTOUZOS ET AL., *supra* note 318, at ix. Although the study notes that this

administrative costs would become ordinary costs of doing business.⁴²⁶ Moreover, the costs of additional paperwork should be minimal. Most employers already keep personnel files on each employee, and the EEOC requires employers to produce information on demographics similar to that proposed here.

To the extent that the costs exceed those already spent by business, the scheme will encourage employers to think twice before firing employees without cause. If the employer has cause to dismiss the employee, the arbitration should be a relatively short, easy, and informal process. Furthermore, the intangible benefit of increased industrial peace in the workplace could well lead to higher productivity among workers.⁴²⁷ Nothing in this proposal would preclude the establishment of in-house dispute resolution centers that, if properly designed and administered with large-scale employee participation, could potentially reduce the disagreements between management and labor and prevent many of the discharges from occurring that would take place in the absence of such procedures.⁴²⁸ By addressing potential conflicts early in the process, the presence of these procedures should reduce litigation and arbitration costs.

Neither should the just cause requirement lead to a higher rate of unemployment and a less vigorous economy. Critics of the German and French systems complain that in Germany⁴²⁹ and France⁴³⁰ the law leads to a higher rate of unemployment. In France, for example, under a recent law entitled the 1993 Loi Aubrey, the highest French court, the Cour de Cassation, blocked a planned layoff of a construction company because the plan did not include information on the number and nature of jobs in the community available to employees losing their jobs.⁴³¹ French employers argue that as a result of the

amounts to only \$2.56 per worker per year, and the total estimated expense including cases settled is \$12.25 per worker per year, this number does not take into account the costs to the system to process these claims. *See id.* at ix-x.

⁴²⁶ The cost will provide some incentive to the employer to assure that just cause exists before discharging an employee. If the costs become too routine, the employer may have less of an incentive to avoid the cost of arbitrations. If this were to happen the deterrence purpose of the civil rights statutes could be compromised.

⁴²⁷ Another question concerning costs is who should bear the cost. There are emotional as well as financial costs to employees who do not have job security. *See supra* notes 342-44 and accompanying text.

⁴²⁸ The Dunlop Commission endorses the establishment of in-house dispute resolution centers with wide-scale employee participation in design and implementation. *See DUNLOP COMMISSION REPORT AND RECOMMENDATIONS, supra* note 48, at 28-29.

⁴²⁹ *See infra* note 435 for a description of the German dismissal law.

⁴³⁰ *See infra* note 434 for a description of the French dismissal law.

⁴³¹ *See* Judgment of May 17, 1995, Cass. Soc., 1995 Bull. Civ. I, No. 159, at 116; *see*

Loi Aubrey they hesitate before hiring new employees because the law makes it so difficult to lay off employees if there is a decline in business.⁴³² They also argue that the presence of the law discourages foreign investment.⁴³³

The labor laws in France⁴³⁴ and Germany⁴³⁵ are much more restrictive of

also Martin Du Bois & Anne Michele Morice, *Judges in France Allowed to Block Plans for Layoffs*, WALL ST. J., May 26, 1995, available in 1995 WL-WSJ 8714731.

⁴³² See DuBois & Morice, *supra* note 431.

⁴³³ See *id.*

⁴³⁴ In France, since 1973, employers can dismiss only for a "real and serious" cause. When dismissing for cause, the employers must grant employees internal hearings. Employees have the right to the presence of an employee representative at the hearing. See Rojot, *supra* note 413, at 116, 118. Before 1975, French law did not separate dismissal or layoffs for economic reasons from dismissal for cause. In 1975, a new law passed that created for the first time the concept of dismissal for economic reasons. See *id.* at 116. The 1975 act required an employer to secure the approval of the appropriate administrative body before dismissing an individual employee or a group of employees for economic reasons. See *id.* The 1975 act, however, failed to define "economic reason" and its interpretation fell to the courts. See *id.* In 1986 and 1989, new acts deleted the requirement to secure administrative approval before firing an employee or group of employees for an economic reason and defined "economic reason" for the first time. See *id.* Even after this change in the law, however, the difference between firing an employee for cause and letting an employee go for an economic reason remained. See *id.* at 117. Even though an employer could dismiss an employee for economic reasons without administrative approval, the employer was subject to extremely complex regulations and procedures "fraught with room for error," giving the administration significant power over the employer. *Id.* at 137.

Moreover, after the change in the law in 1986, the courts were given the power of deciding whether the dismissal for economic reason was justified. See *id.* The supreme civil court has since created an obligation of employers to adapt their workforces to the changing needs of the business by offering training to their employees. See *id.* The court has also required employers to "bump" employees who would be laid off for economic reasons into other vacant positions in the enterprise. See *id.* at 137-38.

⁴³⁵ In Germany, the law against dismissal has a long tradition. Manfred Weiss, *Germany*, in EMPLOYMENT SECURITY LAW AND PRACTICE, *supra* note 371, at 139, 142. Employers are permitted to dismiss employees for extraordinary reasons based on misconduct, incompetence, or severe economic circumstances. See *id.* at 144. An "ordinary dismissal," however, is not normally permitted. There are three exceptions: economic reasons, employee behavior that does not amount to an extraordinary dismissal, and a situation where the worker (through illness or other reason) is unable to fulfill the requirements of his job. See *id.* at 145. Where the employer dismisses for economic reasons, the employer must prove the economic situation. And, even if an economic or other reason could justify the dismissal, the dismissal is unlawful if the employee can be transferred to another job of comparable working conditions within the company, either immediately or after retraining. See *id.* at 146.

Before every dismissal, the employer is obligated to consult with the works council, an

the employer's prerogative than my proposal. The provisions in those countries' laws requiring either administrative approval⁴³⁶ or notice of and consultation with employee organizations⁴³⁷ before collective dismissals simply do not exist in my plan. Although my plan would require just cause for dismissals, it does not limit the employer's right to lay off or collectively dismiss employees where

organization that exists in every workplace to represent all employees' interests, unionized and non-unionized. *See id.* at 150. If the employer fails to notify the works council, the dismissal is null and void. *See id.* The works council examines the legality of the employer's planned dismissal. It can object to the dismissal. An objection must be communicated in writing to the employer. *See id.* The employer must give a copy of the objection to the employee at the time of the dismissal. Such an objection sets out the challenges to the dismissal. *See id.* at 151. Moreover, if the works council objects, the employer must keep the employee in the position through the legal process, unless the employer secures an injunction by proving that continuing employment would be an "intolerable economic burden." *Id.*

Once dismissal takes place, individual employees have the right to sue in labor court for wrongful discharge. *See id.* at 154. The German labor courts are a three-tiered system: courts of the first instance, courts of appeal, and the federal labor court. *See id.* Reinstatement is the ordinary remedy, but is difficult to achieve if the individual employee has not continued working during the legal action. *See id.* at 154-55. The question whether an employee has the right to remain in his position until the end of the legal action has been an important issue in Germany. *See id.* at 155. In 1985, the federal labor court determined that an employee for whom the court of first instance rules has the right to immediate reinstatement pending appeals of the employer. *See id.*

There are additional burdens on employers seeking collective dismissals. Employers are required to notify the State labor exchange office in writing about all measures the employer intends to take within the next twelve months that may lead to collective dismissals. *See id.* at 148. They must give advance notice in writing to the State labor exchange office before the collective dismissals are announced. *See id.* The State labor exchange office has little power, however; it can merely delay the collective dismissal with the intent to find alternative solutions for those being dismissed. *See id.* at 149.

The real power in the law lies in the employer's relationship with the works council. Early in the planning stages, the employer must give the works council the full information concerning its plan and all possible alternatives. *See id.* at 151-152. The employer must reach a "compromise of interests" with the works council. *See id.* at 152. This provision requires that the employer try to work out with the works council whether and how it will carry out its dismissal plan. *See id.* If the employer and the works council do not reach an agreement, either side can request the President of the State labor exchange office to act as a mediator. *See id.* If the mediation does not resolve the dispute or if neither side requests mediation, either side may take the issue to the arbitration committee, a group composed of an equal number of employers and works council representatives. *See id.* The arbitration committee, however, does not have the power to require the employer to alter or abandon its plan for dismissal. *See id.*

⁴³⁶ *See supra* notes 434-35.

⁴³⁷ *See supra* note 435.

there is a serious economic downturn. If an employer's decision to collectively dismiss employees were challenged by an individual employee, the employer would merely have to show that its reason for the collective dismissal or layoff was economic and that it treated its employees in a nondiscriminatory fashion when it selected them for layoffs. Moreover, because of the presence in my proposal of a probationary period in which the employer could fire the employee for any reason other than illegal discrimination,⁴³⁸ employers should not hesitate to hire new employees because of the risk of having to fire them.⁴³⁹

Studies in Great Britain of management attitudes have shown that only eight percent of firms surveyed expressed reluctance to hire additional staff because of the job protection laws in Great Britain.⁴⁴⁰ Instead of failing to hire new employees, employers reacted to the job security laws passed in Britain in the 1970s by taking greater care in selection of persons to hire.⁴⁴¹ The laws have had a positive effect: they have "stimulated the spread and formalisation of grievance and disciplinary procedures, enhanced the role and status of personnel managers and employers' associations and encouraged employers, especially larger ones, in adopting more efficient recruitment and discipline practices."⁴⁴² The just cause requirement in the British law has led to the establishment of internal procedures.⁴⁴³ Companies with internal procedures have a lower rate of suits filed against them in court.⁴⁴⁴ As a result, only approximately 10% of British employees dismissed for reasons other than layoffs file unfair dismissal suits.⁴⁴⁵ In Montana, the only state to have passed

⁴³⁸ The right to charge an employer with firing an employee for membership in a protected class will survive even during the probationary period. This right, however, already exists and will not be substantially affected by the proposal except that the employee will be required to bring the claim to arbitration, a much less expensive forum. This is not harmful to the employer's interests.

⁴³⁹ Another fear may be that part-time and temporary workers will replace full-time workers so that employers can escape the requirements of the law. This is probably not a realistic fear in most businesses because part-time and temporary workers are often not a realistic option.

⁴⁴⁰ See RICHARD W. PAINTER & KEITH PUTTICK, *EMPLOYMENT RIGHTS: A REFERENCE HANDBOOK* 8 (1993) (citing S. EVANS ET AL., *UNFAIR DISMISSAL LAW AND EMPLOYMENT PRACTICE IN THE 1980s*, DES RESEARCH PAPER 53 (1985)).

⁴⁴¹ See *id.*

⁴⁴² *Id.* at 7.

⁴⁴³ See Newman, *supra* note 410, at 427-28. In Britain, the percentage of companies with internal discharge procedures went from 8% in 1969, before the first British law was passed, to 83% of small employers and 99% of large employers in 1980, after the law went into effect. See *id.*

⁴⁴⁴ See *id.*

⁴⁴⁵ See *id.* at 427.

legislation requiring just cause for discharge, the unemployment rate has declined from 7.4% in 1987 when the Montana Wrongful Discharge Act was passed to 5.5% in 1995.⁴⁴⁶ Obviously, that Act did not create a greater rate of unemployment.

Richard Epstein has argued that the antidiscrimination laws actually discourage employers from hiring members of protected classes because employers are afraid that they will not be able to fire them.⁴⁴⁷ Although I believe that Epstein overemphasizes employers' fear of hiring members of protected classes, abolishing the antidiscrimination laws altogether and maintaining the employment at will doctrine would not be the best solution. To the extent that Epstein's theory is true, my system will treat all employees the same; they will all have the right to maintain their jobs absent just cause for their dismissals. Therefore, there should be little incentive to hire white males over members of protected classes. Moreover, I do not propose the complete abolition of the antidiscrimination statutes. Rather, my proposal will eliminate *individual* discharge cases from the federal antidiscrimination laws. If the EEOC has the discharge cases off its docket, it can focus on investigating and bringing failure to hire cases and other class actions under the systemic disparate treatment and disparate impact theories. This use of the EEOC's resources should more efficiently encourage employers to avoid discrimination in hiring, a function that the antidiscrimination law is not currently serving.⁴⁴⁸ Neither relocation of American businesses outside of the United States nor competitive disadvantage in the international marketplace is a likely outcome of my proposal because the vast majority of countries in the industrialized⁴⁴⁹ international market have already incorporated just cause standards into their laws protecting workers.⁴⁵⁰

This proposal is politically feasible. With the support of civil rights advocates who understand that the civil rights in employment acts are not working well, there would be a natural, very well-organized, and powerful combination. The union of civil rights and workers' rights advocates should

⁴⁴⁶ See MONTANA DEP'T OF LABOR & INDUS., RESEARCH & ANALYSIS BUREAU, *Annual Average Labor Force for Montana, 1985-1995* (1996).

⁴⁴⁷ See EPSTEIN, *supra* note 286, at 262-66.

⁴⁴⁸ See *supra* Part II.B.

⁴⁴⁹ Most developed countries have a just cause requirement for dismissal. See *infra* note 450. Many Third World countries already have laws that are more favorable to business, and American companies are not abandoning production in the United States. One reason may be the difficulty businesses have in those countries.

⁴⁵⁰ See Plasencia, *supra* note 371, at 318 (citing to Association of the Bar of the City of New York, Comm. on Labor and Employment Law, *At-Will Employment and the Problem of Unjust Dismissal*, 36 THE RECORD 170, 175 (1981) (noting that in 1981 60 countries provided statutory protections against unjust discharge)).

permit passage of more effective legislation because reform advocates would not have to compromise workers' interests to those of employers in order to have sufficient support for passage of pro-worker legislation.

In any event, my proposal may gain the support of employers because it permits employers to avoid the costly and lengthy litigation brought for civil rights violations and public policy and contractual violations based on handbooks. The legislature in Montana passed a just cause requirement which was backed by employers precisely because the Montana courts had liberally interpreted the covenant of good faith exception to the employment at will doctrine.⁴⁵¹ Although labor unions may be wary of this proposal, the British experience demonstrates that wrongful discharge statutes coexist with healthy unions.⁴⁵² In fact, European unions see the existence of wrongful discharge statutes as aids in their organizing efforts.⁴⁵³ Moreover, union representatives often represent employees in Britain at the hearings contesting the discharge.⁴⁵⁴

Although the Montana statute and the Model Act are not acceptable to employees, they are a beginning in the process. My proposal takes that process one step forward, incorporating the discharge provisions of the employment discrimination statutes into a comprehensive discharge scheme that respects employers' interests while treating all employees fairly.

⁴⁵¹ Schramm, *supra* note 379, at 95.

⁴⁵² See Warren Martin, *Employment at Will: Just Cause Protection Through Mandatory Arbitration*, 62 WASH. L. REV. 151, 169 (1987).

⁴⁵³ See *id.* at 169-70.

⁴⁵⁴ See *id.* at 170.